(3)

No. 89-1895

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 30, 1990
CERTIORARI GRANTED JANUARY 7, 1991

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DOCKET ENTRIES

SOLIMINO

-v-

ASTORIA FEDERAL SAVINGS AND LOAN ASSOC

CV-85-0555

DATE	NR.	PROCEEDINGS
2/21/85	1	Complaint filed. Summons issued. cb
2/26/85	2	Summons returned filed and executed. cb
3/14/85	3	Deft's ANSWER. Filed cb
8-8	–	Before MAC, J-Case Called. COunsel for all side present. Status conf held. Next conf set for 10-22-86, (ent'd 8-11-86 ld
10-10	4	Pltf Notice of Appearance, filed. (ent'd 10-10-86 ld
10-17	5	Pltf Notice for Production of Documents and things, filed. (ent'd 10-17-86 ld
10-22	–	Before MAc, J-Case Called. Counsel for all side present. Status conf held. Next conf 11-24-86. (ent'd 10-23-86 ld
11-24	–	Before MAc, J-Case Called. Counsel for all side present. Status conf held. Next conf set for 1-15-87. deft to turn over document by 12-15-86, filed.
1-12	6	Notice of Oral Deposition of Pltf Angelo J. Solimino, filed. (ent'd 1-21-87 ld
1-12	7	Affidavit of Service (Elise B. Silverman, filed. (ent'd 1-21-86 ld

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* All typographical errors appear in the original.

1-26	8	Pltf's Cross-Notice of Oral Deposition of Henry Drewitz, on 3-19-87 @ 11:00 a.m. filed. (ent'd 1-26-87 ld
2-25	—	Before MAC, j-Case Called. Counsel for all side present. Status conf held. Next conf set for 3-24-87. (ent'd 2-25-87 ld
4-30	9	Deft's Motion to Compel Discovery and Certification of Good Faith Effort to Obtain Discovery Responses, filed. (ent'd 5-4-87 ld
4-30	10	Deft's Memo of Law in Support of its Motion to Compel Discovery. filed (ent'd 5-4-87 ld
6-5	11	Ltf dtd 5-1-87 from Michael S. Cecere to Mr. Gentile pre-trial conf schedule for 5-5-87 has been adjourned. conf reschedule for 5-10-87 @ 10:00 a.m. filed. (emt'd 6-5-87 ld
6-5	12	Ltr dtd 5-21-87 from Joseph J. Gentile to MAC, requesting with the court permission to supply a proper order, regarding the production of said documents, filed. (see order for more detail) ld
6-8	13	Pltf's Responses to Document Demand, filed. (ent'd 6-11-87 ld
6-8	14	Transcript dtd 11-29-87 @ 2:00 a.m. filed. (ent'd 6-8-87 ld
6-3	—	Before MAC, J-Case Called. Counsel for both parties present. Motion argued. Motion granted. ld

6-23	15	Ltr dtd 6-5-87 (unsigned) from paul J. siegel to MAC, requesting a settlement in this case, if settlement is not negotiated, we will appear next before the court on 9-16-87 @ 10:00 a.m. filed. (ent'd 6-23-87
6-23	16	Ltr dtd 6-9-87 from Joseph J. Gentile to MAC regarding Mr. Siegel's recent statement, on 6-5-87, filed. (ent'd 6-23-87 ld
9-23	17	Deft's Supplemental Response to Request #7 of Pltf's Notice to Produce Documents and Things, filed. (ent'd 9-23-87 ld
1987		
11-3	18	Ltr dtd 10-24-87 from Joseph J. Gentile to MAC, regarding enclosed letter to Paul J. Siegel advising him and his law firm of intention to have them disqualified from this case, filed. (see ltr for more detail) ld
11-6	—	Before MAC, J-Case CAlled. Counsel for deft not present. Status conf set for 11-13-87. ld
11-13	—	Before MAC, J-Case Called. Counsel for all sides present. Status conf held. Next conf set for 1-18-88 for motion. ld
1-11	19	Pltf's Motion to take the Deposition of Paul J. Siegel, Deft's Counsel, filed. (ent'd 1-11-88 ld
1-11	20	Pltf's Memo of Law in Support of Motion to Take Deposition of Paul J. Siegel, Deft's Counsel. (ent'd 1-11-88 ld
1-11	21	Memo of Law in Support of Motion to Take Deposition Deft's Counsel, (ent'd 1-11-88 ld

2-11	22	Memo of Law in Opposition to Pltf's Motion to take the Deposition of Paul J. Siegel Deft's Counsel, filed. (ent'd 2-16-88 ld
2-11	23	Affidavit of Anthony H. Atlas in Opposition to Pltf's Motion to Take the Deposition to Paul J. Siegel, Deft's Counsel, filed. (ent'd 2-16-88. ld
2-16	24	Affidavit of Service of Shirley Gibbs, filed. (ent'd 2-16-88 ld
2-18	–	Before MAC, J-Case Called. Counsel for both parties present. Motion argued. Motion denied. Next conf set for 9-22-88. (ent'd 2-19-88 ld
9-22	–	Before MAC, J-Case CAlled. Counsel for all sides present. Status conf held. Next status conf scheduled for 12-8. ld
12-8	25	BEFORE MAC, J-Case Called. Counsel for all sides present. Status conf held. Next status conf scheduled for 2-9-89. ld
1989		
2-9	–	BEFORE MAC-Case called. Counsel for all sides present. Status conf. held. Motion to be filed by 2-23-89. Motion returnable on 3-16-89. mamc
2-23	26	NOTICE of MOTION for SUMMARY JUDGMENT and DEFT'S STATEMENT of MATERIAL FACTS not in DISPUTE ret on 3-16-89 ¶ 10:30 a.m. filed. (ent'd 2-24-89) ld
2-23	27	MEMO of LAW in SUPPORT of DEFT'S MOTION for SUMMARY JUDGMENT, filed. (ent'd 2-23-89) ld

2-23	28	MOVING AFFIDAVIT of ANTHONY H. ATLAS in SUPPORT of DEFT'S MOTION for DEFT'S MOTION for SUMMARY JUDGMENT, filed. (ent'd 2-24-89) ld
2-24	29	EXHIBITS to the Moving AFFIDAVIT of ANTHONY H. ATLAS, filed. (ent'd 2-24-89) LD
3-2	30	LTR dtd 2-23-89 from Sara J. Herrin to MAC re: regarding courtesy copy of deft's appears in support of its motion for summary judgment not enclosed, filed. (ent'd 3-2-89) ld
3-13	31	Pltf's Opposition to Motion for Summary Judgment filed/w Affidavit of Pltf Angelo J. Silimino, in Opposition to Motion for Summary Judgment, filed. (ent'd 3-13-89) ld
3-13	32	MEMO of Law in Opposition to Deft's Motion for Summary Judgment, filed. (ent'd 3-13-89) ld
3/16	33	Notification of case reassignment by random selection to J. Glasser filed. c/m (ent'd 3/16/89) LL
3/23	34	By Glasser, J., Order dated 3/22/89 that parties are directed to appear for a status conference on 4/11/89 at 4:30PM. CM (ent'd 3/23/89). eg
3/16*	35	Deft's Reply Memo of Law to pltff's opposition to motion for summary judgment, filed. (ent'd. 4/4/89). eg

4/11	–	Before Glasser, J., Case called for conference. Counsel for pltff Mr. Gentile present. Counsel for deft Mr. Atlas present. This case was reassigned to Judge Glasser, with a motion for summary judgment pending. The motion will be heard on 5/19/89 at 9:30AM. eg
5/3	36	Pltff's Rule 3(g) Statement filed. (ent'd. 5/4/89). eg
5/19	–	Before Glasser, J., case called. Only Joseph Gentile present. Motion for summary judgment submitted. eg
6/2	37	By ILG MEMORANDUM AND ORDER dtd 5/31/89 defts motion for summary judgment is granted, filed. ent 6/2/89 vv c/m
6/5	38	JUDGMENT dated 6/2/89 that pltff take nothing of deft; & deft's motion for summary judgment is granted on the ground that pltff is administratively estopped from proving this case. CM (ent'd. 6/5/89). eg
6/28	39	****NOTICE OF APPEAL filed. (Pltff/Appellant) from the judgment and order ent'd in this action on 6/2/89. C of A docket fee paid/receipt #110947. NOA served by Clerk. C of A notified. 6/28/89 aoh
7/12	40	Scheduling order from the C of A dated 7/11/89 filed. District court record to be filed by 8/3/89; appellant's brief/appendix by 8/10/89; appellee's brief by 9/7/89; argument to be heard the week of 9/25/89 CofA #89-7639. 7/18/89 aoh
7/25	41	Letter dated 7/20/89 from Anthony Atlas to Mr. Heinemann re: change in the listing of deft's attorney of record. (ent'd. 7/27/89). eg

8/29	–	RECORD certified & sent to C of A. Ackn requested. aoh
9/11	42	Ackn rec'd from C of A for receipt of record on appeal, filed. aoh

SUMMONS DATED FEBRUARY 21, 1985

SUMMONS IN A CIVIL ACTION

United States District Court	District E.D.N.Y.
Angelo J. Solimino,	DOCKET NO.
	COSTANTINO, J.
Plaintiff,	TO: (NAME AND ADDRESS OF DEFENDANT)
v.	Astoria Federal Savings and
Astoria Federal Savings	Loan Association
and Loan Association,	37-16 30th Ave.
Defendant.	Long Island City, N.Y.

YOU ARE HEREBY SUMMONED and required to serve upon

PLAINTIFF'S PRO SE (NAME AND ADDRESS)

Angelo J. Solimino
35 Ava Drive
Syosset, N.Y. 11791

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK ROBERT C. HEINEMANN

(BY) DEPUTY CLERK /s/Steven B. Sheinwald

DATE 2-21-85

COMPLAINT DATED FEBRUARY 20, 1985

CV-85-0555

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	Civ. No.
Plaintiff,	:	COMPLAINT
-against-	:	Plaintiff Demands
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	Trial by Jury
Defendant.	:	

Plaintiff complains of the defendant and respectfully alleges as follows:

1. This action arises under the provisions of Section 4(a)(1) and 4(a)(2) of the Age Discrimination in Employment Act (ADEA) (29 USC Section 623(a)(1) and (2), and Section 7(b) of the ADEA (29 USC Section 626(b) and Section 16(b) of the Fair Labor Standards Act (FLSA) (29 USC Section 216(b)).

2. Jurisdiction of this action is conferred upon this Court by Section 7(b) and 7(c) of the ADEA (29 USC Section 626 (b) and (c)) and Section 16(b) of the FLSA (29 USC Section 216 (b), as amended (29 USC Section 201 *et seq.*).

3. ANGELO J. SOLIMINO, plaintiff herein, is a resident of the County of Nassau and State of New York, and resides at 35 Ava Drive, Syosset, New York 11791.

4. The defendant, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, is a savings and loan association, organized and existing under the laws of the United States

of America, having its office and principal place of business at 37-16 30th Avenue, Long Island City, County of Queens and State of New York.

5. The defendant was, and is, engaged in commerce within the meaning of the ADEA, and was and is engaged in an industry affecting commerce as defined in Section 11(h) of said ADEA (29 USC Section 630(h)).

6. At all relevant times, the defendant has been engaged in an industry affecting commerce, as aforesaid, and has employed 20 or more employees for each working day in each of 20 or more calendar weeks in the preceding calendar year, and defendant was, and is, therefore, an employer within the meaning of Section 11(b) of the ADEA (29 USC Section 630(b)).

7. More than 60 days prior to instituting this action, plaintiff timely filed a complaint and/or charges with the Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights, and the EEOC and the Division of Human Rights unsuccessfully attempted to eliminate such discriminatory practices complained of, and attempted but failed to effect any voluntary compliance with the requirements of the ADEA on the part of the defendant, through methods of conciliation, conference and persuasion.

8. The date of birth of the plaintiff is December 4th, 1918; and he entered the employ of the defendant on October 4th, 1945.

9. Beginning after the plaintiff attained the age of 56 years, the defendant began to discriminate against him with respect to his compensation and privileges of employment.

10. This discrimination was commenced despite the fact that the plaintiff had contributed greatly, and was still contributing greatly to the business and financial success of his employer, as an officer and as a public relations man in the mortgage origination department.

11. This discrimination was commenced and was continued through a pattern of denying the plaintiff his rightful increases

in salary, and his rightful increases in rank or promotions, while at the same time, increasing the salaries and job positions of many other employees, most of whom were lesser in ability and all of whom were much younger than the plaintiff, both in terms of age and seniority.

12. On March 5th, 1982, the defendant wilfully terminated the plaintiff's employment because of his age.

13. As a result of the defendant's wilful termination of his employment, and wilful discrimination against him, all because of his age, in violation of the ADEA, as aforesaid, plaintiff has suffered damages and will continue to suffer damages, including, but not limited to, lost wages, lost salary increases, promotions that were unjustly denied him, valuable fringe benefits, higher pension benefits and other job-related benefits, so that there is due and owing to plaintiff as of this time, the sum of Two Hundred and Forty Thousand ($240,000) Dollars.

WHEREFORE, plaintiff prays as follows:

1. That the Court issue a mandatory injunction directing the defendant to forthwith employ the plaintiff in the position of Vice-President in the Mortgage Origination Department, at a salary commensurate with the salaries of other Vice-Presidents in other departments who have equivalent rank and seniority;

2. That this Court award plaintiff the sum of Two Hundred and Forty Thousand ($240,000) Dollars, for the loss of wages, pension benefits and other benefits he has suffered to this date, together with the additional sum of Two Hundred and Fifty ($250) Dollars for each day that elapses until plaintiff is employed by defendant;

3. That this Court award plaintiff the costs of this action, together with liquidated damages as provided by law, and in the event that plaintiff shall later have legal representation herein, the reasonable attorneys' fees thereof;

4. That this Court grant plaintiff such other and further relief as may be just and equitable in the premises.

Dated: Syosset, N.Y.
February 20th, 1985

ANGELO J. SOLIMINO,
appearing pro se
35 Ava Drive, Syosset, N.Y. 11791
(516) 921-3314

ANSWER DATED MARCH 11, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555
Plaintiff,	:	Judge Costantino
-against-	:	
	:	ANSWER
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	
Defendant.	:	

Defendant, by its attorneys, Jackson, Lewis, Schnitzler & Krupman, for its answer to the complaint herein respectfully states as follows:

1. Denies each and every allegation contained in paragraph "1" thereof, except admits that this suit has been brought purportedly under the statutes enumerated therein.

2. Denies each and every allegation contained in paragraph "2" thereof, except admits Plaintiff alleges that jurisdiction is conferred under the statutes enumerated therein.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" thereof.

4. Admits the allegations contained in paragraph "4" thereof.

5. Admits the allegations contained in paragraph "5" thereof.

6. Admits the allegations contained in paragraph "6" thereof.

7. Denies each and every allegation contained in paragraph "7" thereof, except admits that a complaint was filed with the Equal Employment Opportunity Commission and the New York State Division of Human Rights more than 60 days prior to instituting this action and affirmatively avers that said complaint was dismissed by the State Division based upon the finding that there was no probable cause to believe Plaintiff's allegations of age discrimination and that said dismissal was affirmed on appeal by the New York Human Rights Appeal Board.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8" thereof, except admits that Plaintiff began employment with Defendant on or about October 4, 1945.

9. Denies each and every allegation contained in paragraph "9" thereof.

10. Denies each and every allegation contained in paragraph "10" thereof.

11. Denies each and every allegation contained in paragraph "11" thereof.

12. Denies each and every allegation contained in paragraph "12" thereof.

13. Denies each and every allegation contained in paragraph "13" thereof.

FOR A FIRST DEFENSE

14. The complaint fails to state a claim upon which relief may be granted.

FOR A SECOND DEFENSE

15. Plaintiff's claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*, is barred by the applicable statute of limitations.

FOR A THIRD DEFENSE

16. Plaintiff has failed to satisfy conditions precedent and/or jurisdictional requisites to suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*

FOR A FOURTH DEFENSE

17. Each and every action of Defendant which is the subject of the complaint was taken for legitimate, non-discriminatory business reasons only.

FOR A FIFTH DEFENSE

18. Defendant has not violated any rights which may be secured to Plaintiff under federal law.

FOR A SIXTH DEFENSE

19. At all relevant times herein, Defendant acted in good faith and in full compliance with the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*

FOR A SEVENTH DEFENSE

20. Plaintiff voluntarily terminated his employment with Defendant.

WHEREFORE, Defendant respectfully requests that judgment be entered:

1. dismissing the complaint in its entirety;

2. ing each and every claim and demand for relief contained therein;

3. awarding Defendant costs and reasonable attorneys' fees; and

4. granting Defendant such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, NY 10016
(212) 697-8200

By: /s/Michael S. Cecere
Michael S. Cecere

Attorneys for Defendant

Dated: March 11, 1985
New York, NY

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555
Plaintiff,	:	Judge Costantino
-against-	:	
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	CERTIFICATE OF SERVICE
Defendant.	:	

The undersigned hereby certifies that a true and correct copy of Defendant's Answer was served on Angelo J. Solimino, by mailing said copy, postage prepaid, to him at his home at 35 Ava Drive, Syosset, New York 11791, this 11th day of March, 1985.

/s/Michael S. Cecere
Michael S. Cecere

Dated: March 11, 1985
New York, NY

NOTICE OF MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555 (MAC)
Plaintiff,	:	
-against-	:	
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	**NOTICE OF MOTION FOR SUMMARY JUDGMENT**
Defendant.	:	

SIR:

PLEASE TAKE NOTICE that, upon the annexed Moving Affidavit of Anthony H. Atlas, duly sworn to February 23, 1989 and the exhibits submitted therewith and upon the pleadings herein, Defendant Astoria Federal Savings and Loan Association will move this Court, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on the 16th day of March, 1989 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment in Defendant's favor and dismissing the Complaint herein and awarding Defendant costs, attorneys fees and such other relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Civil Rule 3(g), a Statement of Material Facts, as to which Defendant contends there is no genuine issue, is annexed hereto.

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, New York 10016
(212) 697-8200

By: /s/Anthony H. Atlas
Anthony H. Atlas
Paul J.Siegel
Sara J. Herrin

ATTORNEYS FOR DEFENDANT

Dated: New York, New York
February 23, 1989

To: JOSEPH J. GENTILE, Esq.
Attorney for Plaintiff
30-15 30th Avenue
P.O. Box 2175
Long Island City, N.Y. 11102

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE FEBRUARY 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555 (MAC)
Plaintiff,	:	
-against-	:	**DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	
Defendant.	:	

Pursuant to Local Court Rule 3(g), Defendant Astoria Federal Savings and Loan Association hereby submits, in support of its motion for summary judgment, this statement of material facts not in dispute:

1. Plaintiff Angelo J. Solimino ("Plaintiff") was employed by Defendant Astoria Federal Savings and Loan Association ("Astoria") in various capacities from on or about October 4, 1945 to March 5, 1982. At the time of the termination of his employment, Plaintiff was Vice President of the Mortgage Origination Department. (*Exhibit 3* to moving affidavit of Anthony H. Atlas, Solimino depo. at 32).[1]

2. On February 18, 1982, Astoria's President, Henry Drewitz, met with Planitiff (Solimino depo. at 111).

3. At that meeting, Mr. Drewitz told Plaintiff that the Board of Directors had decided to terminate Plaintiff's employment

[1] Hereafter cited simply as "Solimino depo. at ____." The deposition was taken on December 1, 1988.

and offer him early retirement due to the size of financial losses the previous year (1981) and projected losses for 1982 (Solimino depo. at 112).

4. At the said meeting of February 18, 1982, Plaintiff asked to be allowed to stay on for another 30 to 60 days, but Mr. Drewitz refused this request. Mr. Drewitz advised Plaintiff that his last day of work would be March 5, 1982. (Solimino depo. at 112, 115).

5. When, on March 4, 1982, Rhoda Baisi, Director of Personnel of Defendant, asked Plaintiff to sign a letter concerning supplemental pension benefits, Plaintiff knew his employment by Defendant had already been terminated. (Solimino depo. at 112).

6. On March 18, 1982, Plaintiff filed a charge with the New York State Division of Human Rights ("the Division") and the United States Equal Employment Opportunity Commission ("EEOC"). In that charge, Plaintiff claimed that he had been discriminated against because of his age when his employment was terminated.

7. Plaintiff also claimed that Defendant denied him salary increases and promotions from 1974 to 1981. (Solimino depo. at 129-135).

8. The charge stated, with respect to the date the alleged discriminatory termination occurred:

> Date most recent or continuing discrimination took place (month, day, and year) *February 18, 1982.*
>
> I have been denied monetary compensation and/or other recognition compensorate (sic) to my work performance and title as a staff officer. *I have been given a notice of termination on February 18, 1982* and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective March 5, 1982.

(*Exhibit 4* to moving affidavit of Anthony H. Atlas; emphasis added).[2]

9. Plaintiff was represented by an attorney, Joseph J. Gentile, Esq., throughout the Division's proceedings. (Solimino depo. at 126).

10. As part of its investigation of Plaintiff's charge, the Division held an investigative hearing on November 29, 1982. At that investigative hearing, sworn testimony was taken from Plaintiff and Defendant's witnesses. Plaintiff had the opportunity to and did question Defendant's witnesses. (*See Exhibit 5* to the moving affidavit of Anthony H. Atlas).

11. On or about January 25, 1983, the Division issued a determination that no probable cause existed to believe that the discrimination alleged had occurred. (*Exhibit 6* to the moving affidavit of Anthony H. Atlas).

12. On about January 31, 1983 Plaintiff appealed that decision to the New York State Human Rights Appeal Board. (*Exhibit 7* to the moving affidavit of Anthony H. Atlas).

13. On or about May 30, 1984 the Board affirmed the Division's determination. (*Exhibit 8* to the moving affidavit of Anthony H. Atlas; Solimino depo. at 99).

14. On or about August 3, 1983, Plaintiff commenced an action in the Supreme Court, New York County (Index No. 22074/83) against four officers of Defendant, two functionaries of the Division, Jackson, Lewis, Schnitzler & Krupman and Paul J. Siegel, then an associate of that firm. (Solimino depo. at 96-97, 127; *Exhibit 9* to the moving affidavit of Anthony H. Atlas).

15. Plaintiff was represented by Mr. Gentile in that action. (Solimino depo. at 127).

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[2] Also marked Exhibit "K" for identification at the Solimino deposition.

16. In the said action, Plaintiff asserted causes of action relating to alleged improprieties arising out of the proceeding before the Division. (*Exhibit 9* to the moving affidavit of Anthony H. Atlas).

17. The defendants in that action moved to dismiss the Complaint.

18. On or about March 6, 1984, the Supreme Court, Special Term, granted the motion to dismiss all defendants except the Division's functionaries. (*Exhibit 10* to the moving affidavit of Anthony H. Atlas).

19. An order of dismissal was entered on April 16, 1984. (*Exhibit 11* to the moving affidavit of Anthony H. Atlas).

20. On April 12, 1984, Special Term granted the Division officials' motion to dismiss; an order of dismissal was entered on May 10, 1984. (*Exhibits 12 and 13* to the moving affidavit of Anthony H. Atlas).

21. Plaintiff appealed the said orders of dismissal to the Appellate Division of the Supreme Court, First Department. That Court affirmed the order of Special Term without opinion on or about May 7, 1985. (*Exhibit 14* to the moving affidavit of Anthony H. Atlas).

22. Plaintiff did not appeal or seek leave to appeal to the New York State Court of Appeals.

23. On *February 21, 1985*, Plaintiff filed a complaint alleging that Defendant had violated the Age Discrimination in Employment Act. (*Exhibit 1* to the moving affidavit of Anthony H. Atlas).

24. The complaint in the instant action was prepared by Mr. Gentile but was signed and filed by Plaintiff, *pro se*, since, at that time, Mr. Gentile was not admitted to practice in the

United States District court for the Eastern District of New York. (Solimino depo. at 127-128).

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, New York 10016
(212) 697-8200

By: /s/Anthony H. Atlas
Anthony H. Atlas
Paul J. Siegel
Sara J. Herrin

ATTORNEYS FOR DEFENDANT

Dated: February 23, 1989
New York, New York

MOVING AFFIDAVIT OF ANTHONY H. ATLAS IN SUPPORT OF MOTION DATED FEBRUARY 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO, Plaintiff, -against- ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant.	CV-85-0555 (MAC) **MOVING AFFIDAVIT OF ANTHONY H. ATLAS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ANTHONY H. ATLAS, being duly sworn, deposes and says:

1. I am Counsel to the firm of Jackson, Lewis, Schnitzler & Krupman, attorneys for Astoria Federal Savings and Loan Association, the Defendant herein, and as such, I am familiar with this case. I make this affidavit in support of Defendant's motion for summary judgment.

2. On February 21, 1985, Plaintiff commenced this action by filing a complaint alleging that Defendant willfully violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*,: (1) by denying Plaintiff salary increases and promotions from 1974 through 1981, and (2) by terminating his employment on March 5, 1982. (A copy of the complaint is submitted herewith as *Exhibit 1*).

3. A timely answer was served and filed on March 11, 1985. (A copy of the answer is submitted herewith as *Exhibit 2*). Defendant's answer asserted various affirmative defenses including allegations that Plaintiff's claims are barred by the statute of limitations and also are procedurally precluded.

4. On December 1, 1988, Defendant commenced the deposition of Plaintiff. Relevant portions of the transcript of that day's deposition, cited in Defendant's memorandum of law and statement of material facts, are submitted herewith as *Exhibit 3* and are hereafter cited as "Solimino depo at ____".

5. On March 18, 1982, Plaintiff filed a charge with the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission that he had been discriminated against by reason of his age in violation of the Age Discrimination in Employment Act when he was discharged from his employment. At the time, he was a vice president of Defendant in its mortgage origination department. In addition, Plaintiff alleged that he was discriminated against when he was denied salary increases and promotions during the period 1974-1981. A copy of the charge (identified at the deposition as Exhibit "K") is submitted herewith as *Exhibit 4*.

6. In his charge alleging age discrimination, Plaintiff stated, in response to the question printed on the form as to the date the alleged discrimination took place:

> Date Most Recent Or Continuing Discrimination Took Place (Month, day and year) *February 18, 1982*.

And again, in the narrative portion of the charge, Plaintiff stated the nature and date of alleged discrimination:

> I have been denied monetary compensation and/or other recognition compensorate (sic) to my work performance and title as a staff officer. *I have been given a notice of termination on February 18, 1982* and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective on March 5, 1982.

(*Exhibit 4*; emphasis added)

7. At his deposition, Plaintiff was asked about this. He not only re-affirmed the statements in his charge (Solimino depo. at 85-86; 117-118), but affirmatively admitted that he was notified on *February 18, 1982* that his employment would be terminated on March 5, 1982. (Solimino depo. at 111).

8. Plaintiff further testified at his deposition that he was represented by an attorney throughout the Division's proceedings. (Solimino depo. at 126).

9. As part of its investigation of Plaintiff's charge, the Division held an investigative hearing on November 29, 1982. At that hearing, sworn testimony was taken from Plaintiff and Defendant's witnesses. Plaintiff had the opportunity to question Defendant's witnesses. (A copy of the transcript of the hearing is submitted herewith as *Exhibit 5*. This transcript is submitted to show that the Plaintiff had a full and fair opportunity to litigate his claim of age discrimination, and not necessarily for the truth of the statements made therein.)

10. On or about January 25, 1983, the Division issued its determination that no probable cause existed to believe that the alleged discrimination had occurred. A copy of the determination is submitted herewith as *Exhibit 6*.

11. On or about January 31, 1983, Plaintiff appealed that decision to the New York State Human Rights Appeal Board (*Exhibit 7* submitted herewith). The Board affirmed the determination of the Division on or about May 30, 1984 (*Exhibit 8* submitted herewith). Although Plaintiff had the right to do so, he did not further appeal to the Appellate Division of the State Supreme Court.

12. On or about August 3, 1983, while the Human Rights Appeal Board appeal was still pending, Plaintiff commenced an action in the Supreme Court, New York County (Index No. 22074/83) against four officers of Defendant, two functionaries of the Division, Jackson, Lewis, Schnitzler & Krupman and Paul J. Siegel, then an associate and now a member of Jackson, Lewis, Schnitzler & Krupman (Solimino depo. at 96-97, 127). A copy of the complaint is submitted herewith as *Exhibit 9*.

13. In that action, Plaintiff asserted causes of action for "conspiracy" and libel arising out of and attacking the conduct of the Division proceeding (*Exhibit 9*). Plaintiff was represented by Mr. Gentile in this action. In effect, Plaintiff sought to have the Division's action judicially reviewed, while by-passing the statutory procedure.

14. The defendants in the state court action moved to dismiss the entire Complaint. On or about March 6, 1984, Special Term granted the motion to dismiss of all defendants except the Division functionaries (*Exhibit 10* submitted herewith). An order of dismissal was entered on April 16, 1984 (*Exhibit 11* submitted herewith). On April 12, 1984, Special Term granted the Division employees' motion to dismiss, (*Exhibit 12* submitted herewith). An order of dismissal was entered on May 10, 1984 (*Exhibit 13* submitted herewith).

15. Plaintiff appealed the dismissal to the Appellate Division, First Department. That court affirmed the order without opinion on or about May 7, 1985 (*Exhibit 14* submitted herewith).

16. On February 21, 1985, Plaintiff commenced the within action claiming age discrimination. Joseph Gentile, Plaintiff's attorney on all other aspects of this matter drafted the complaint in this action, although Plaintiff filed the complaint, acting *pro se*, since Mr. Gentile was not then admitted to practice before this Court. (Solimino depo. at 127-128). Mr. Gentile was subsequently admitted to practice before this Court and he has filed his notice of appearance as Plaintiff's counsel.

17. The undisputed material facts show that Plaintiff's claims are barred by the statute of limitations. The date on which the *last* alleged discriminatory act occurred with respect to the termination of his employment was *February 18, 1982*. This action, filed on *February 21, 1985*, was commenced *three years and three days* from the date the Plaintiff's claims accrued. Thus, Plaintiff's claims here are untimely. The claims with respect to salary and promotions are well beyond the time-bar.

18. The undisputed material facts also show that Plaintiff's Claims are procedurally precluded. The Division was acting in a judicial capacity with respect to Plaintiff's claims. The issues of age discrimination, resolved by the Division, are identical to the issues in this action. The state administrative and judicial proceedings offered Plaintiff a full and fair opportunity to litigate his claims of age discrimination. Such administrative determinations are entitled to preclusive effect in the courts of New York. Plaintiff, moreover, sought to give himself an additional opportunity to litigate the issues when he brought the Supreme Court action. The purpose of it was clear: to reopen or reverse the Division proceedings and its determination. Although the maneuver failed, the opportunity was present. Plaintiff is thus procedurally precluded from again raising the issues.

19. For these reasons, Defendant's motion for summary judgment should be granted and the Complaint dismissed in its entirety and awarding Defendant costs, attorneys fees and such other relief as to the Court may seem just and proper.

/s/Anthony H. Atlas
Anthony H. Atlas

Sworn to before me this
23rd day of February, 1989

/s/Esther E. Elder
Notary Public

Esther E. Elder
Notary Public State of New York
No. 24-4601297
Qualified in Kings County
Certificate filed in New York County
Commission Expires October 31, 1990

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:

EXHIBIT 4 - CHARGE OF DISCRIMINATION

BY OMB 8-0011 Expires 12/31/83

CHARGE OF DISCRIMINATION

CHARGE NUMBER(S) (AGENCY USE ONLY) ☐ 021821330

IMPORTANT: This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

Equal Employment Opportunity Commission
NYS Division of Human Rights

NAME (Indicate Mr., Ms. or Mrs.)	HOME TELEPHONE NUMBER (include area code)
Mr. Angelo J. Solimino	(516) 921-3314
STREET ADDRESS 35 Ava Drive	
CITY, STATE AND ZIP CODE Syosset, New York 11791	COUNTY

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (if more than one list below).

NAME	TELEPHONE NUMBER (Include area code)
Astoria Federal Savings and Loan	
STREET ADDRESS 37-16 30th Avenue	CITY, STATE, AND ZIP CODE L.I.C., New York 11103

NAME TELEPHONE NUMBER (Include area code)

STREET ADDRESS CITY, STATE, AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☒ OTHER (Specify) AGE

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)
February 18, 1982

THE PARTICULARS ARE:

Date of Birth: December 4, 1918

I have been denied monetary compensation and/or other recognition compensorate to my work performance and title as a staff officer. I have been given a notice of termination on February 18, 1982 and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective on March 5, 1982. I was hired October 4, 1945 as a teller and promoted several times to the Vice President title in or about 1962.

The reason given by Henry Drewitz, President, for the termination was the mortgage industry is very slow, and that two Vice Presidents were no longer needed.

I believe I have been discriminated against because of my age (63 yrs.) for the following reasons:

1. I was the oldest Officer out of approximately 30 officers and/or assistant officers employed by the respondent.

2. My duties and functions as Vice President of the Mortgage Origination Department were absorbed by younger staff officers who I trained.

3. Upon belief, had I been a younger staff officer I would not have been forced into early retirement.

Deft. Ex. K.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

Received March 18, 1982, Intake E.E.O.C. - N.Y.D.O.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 3/18/82
CHARGING PARTY (Signature) /s/ Angelo J. Solimino

EEOC FORM 5A MAR 79

PREVIOUS EDITIONS OF ALL EEOC FORM 5'S ARE OBSOLETE AND MUST NOT BE USED

RESPONDENT'S COPY

EXHIBIT 5 - TRANSCRIPT OF HEARING DATED NOVEMBER 29, 1982

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

----------X

STATE DIVISION OF HUMAN RIGHTS
ON THE COMPLAINT OF:

ANGELO J. SOLIMINO,

Complainant,

– against –

ASTORIA FEDERAL SAVINGS AND LOAN,

Respondent.

----------X

89-02 Sutphin Boulevard
Jamaica, New York

November 29, 1982
2:00 P.M.

INVESTIGATIVE HEARING held at the above mentioned time and place, pursuant to Notice, before a Notary Public of the State of New York.

HARRIET BEIZER ASSOCIATES
"A Verbatim Reporting Service"
70-49 AUSTIN STREET
FOREST HILLS, NEW YORK 11375
544-4199

APPEARANCES:

JOSEPH J. GENTILE, ESQ.
Attorney for Complainant
30-15 30th Avenue
Long Island City, New York 11102

JACKSON, LEWIS, SCHINTZLER & KRUPAN, ESQS.
Attorneys for Respondent
261 Madison Avenue
New York, New York 10016
BY: PAUL J. SIEGEL, ESQ., of Counsel

Also Present:
Annabell Weiner - Human Rights Specialist

Witnesses:
Angelo J. Solimino
Henry Drewitz
Frank M. Beiter
Arnold K. Greenberg
Rhoda Baisi

• • • •

ANGELO J. SOLIMINO,
HENRY DREWITZ,
FRANK M. BEITER,
ARNOLD K. GREENBERG,
RHODA BAISI,

the witnesses herein, having been first duly sworn by a Notary Public of the State of New York, testified as follows:

MS. WEINER: The complainant is Angelo J. Solimino. The respondent is Astoria Federal Savings and Loan. "I have been denied monetary compensation and/or other recognition commensurate to my work performance and title as a staff officer. I have been given a notice of termination on February 18th, 1982 and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective on March 5th, 1982. I was hired October 4th, 1945 as a Teller and promoted several times to the Vice President title in or about 1962. The reason given by Henry Drewitz, President, for term. ation was the mortgage industry is very slow and that two Vice Presidents were no longer needed. I believe I have been discriminated against because of my age, 63, for the following reasons: 1, I was the oldest officer out of approximately 30 officers and/or assistant officers employed by the respondent; 2, my duties and functions as Vice President of the Mortgage Originators Department were absorbed by younger staffed officers who I trained; 3, upon belief had I been a younger staff officer I would not have been forced into early retirement."

Who will speak first?

MR. SIEGEL: I would think that Mr. Drewitz will explain how this came to pass and the specifics will be explained by those that were specifically involved.

Will you explain how this entire decision was necessary?

MR. DREWITZ: In order to improve the efficiency of our Mortgage Department, I'd had Mr. Greenberg, who is our Senior Vice President, make a thorough analysis of the entire Mortgage Department and he came in with certain conclusions and in keeping with his conclusions and also the fact that the mortgage activity had been diminished because of the high interest rates and the prospect for early renewal of high rate lending, the staff that we had, the executive staff, was not necessary. It was not necessary for us to operate with two Vice Presidents there.

MR. SIEGEL: Why don't you explain the report you did?

MR. GREENBERG: I went into Woodside, which is where our Mortgage Origination Department is, and prior to that I had spoken with several of the people in the Association, the personnel officer, people in other departments, attorneys and so on, to try to get a feel for how is that department running. As Mr. Drewitz described the business was slowing down, but the efficiencies did not seem to be there in the department, so I went through and I looked at most of the job functions, almost all of them, on a broad brush basis. I found that the personnel in Woodside, about 20 I think, something like that, the attitudes ran from apathy, jealousy, lack of respect, bossiness, and it seemed to be a major problem just in the department and in order to do any real work flow analyses and adjustments, I felt that some switches would have to be made in the personnel who were there. Some of the Clerk/Typists I felt were in the wrong areas and some of the officers I felt were doing the wrong type of job.

MS. WEINER: Was that done in any other department?

MR. GREENBERG: No. Just this department.

MR. GENTILE: He is much too general. I would like to know to whom he spoke and also his qualifications for conducting an investigation in a department he knew nothing about.

MS. WEINER: Could we hold that until we hear from everyone?

MR. GENTILE: Yes.

MR. GREENBERG: At the time I started working at the department, there was another fellow there, Joe Salz, who was an Assistant Secretary, I think, and he was basically charged with the responsibility of handling the Clerk/Typists, the lower level people in the department, and he gave me an organization chart and some of the work flows. It seemed as though we had too many people for the type of volume going through there. Previously I mentioned the people were apathetic, some jealous, some bossy. It was a loose situation. That was Joe Salz's responsibility, so my recommendations for the change were

basically to switch Joe out, which we did. We switched him into another department and he was replaced over there and also to remove the building loan function from what Angelo was doing and transfer that to Frank Beiter and his Secretary. It was Angelo and his Secretary, I believe. I don't know if that's what he called her. They were basically handling the building loans and I felt the volume was so low that it could be switched away and Frank and his Secretary could handle that very well. The problem then came down we'd taken away just about all the high powered – that's the wrong word.

MR. SIEGEL: Would you say it was his Vice Presidential duties?

MR. GREENBERG: Basically the job he would have been left with was being performed by, to some degree, some Clerk/Typists also.

MR. SIEGEL: When Mr. Salz was performing that internal personnel function, who had performed that previously and why was it then performed by Mr. Salz?

MR. GREENBERG: I believe Angelo was doing that before Mr. Salz and apparently there were problems then which I had to get involved with that was previous, a year or year and a half before. Apparently it wasn't being done properly, so Joe Salz was given that responsibility.

MR. GENTILE: I first would like to know if there were any complaints made about any of the Clerk/Typists or any other personnel in the Mortgage Department, any complaints made about insubordination or lack of work or insufficiency.

MR. GREENBERG: By who? The public?

MR. GENTILE: Anyone who made any complaints these people were inefficient and not working. When Mr. Solimino was in charge, were there any complaints about personnel?

MR. GREENBERG: I don't know.

MR. GENTILE: You have no knowledge about that?

MR. SIEGEL: This is three years or more.

MR. GENTILE: I want to clarify it. He has no knowledge about what occurred prior to Mr. Salz being there, so he should not make a comment on it.

MS. WEINER: Everything is open right now. Of course, you realize in a charge of discrimination when the investigator has to investigate they have to know what to delete and what to consider.

Who would be the next one?

MR. SIEGEL: What were your recommendations?

MR. GREENBERG: To give the building loan function, which was being performed by Angelo and his Secretary, to primarily Frank's Secretary and I believe she's doing that now. I'm not sure. I haven't gone back there recently. To replace Joe Salz with a Mary Klecar and she would take over the responsibilities for the administrative part of it.

MR. GENTILE: When was that?

MR. GREENBERG: Early part of this year.

MR. GENTILE: Give a date.

MR. GREENBERG: January, February.

MR. GENTILE: You made a report to the Board?

MR. GREENBERG: The date of the Board meeting.

MR. GENTILE: Can somebody supply the Board meeting?

MR. SIEGEL: It was attached.

MR. GENTILE: But there was no date on those papers.

Do you have a date? This was your February, 1982 meeting?

MR. DREWITZ: February 17th.

MR. GENTILE: May I ask another question?

MS. WEINER: Yes, sir.

MR. GENTILE: I notice on these two pages which are unsigned, they contain the same serial number.

Are all your pages separately numbered or are they all with the same number?

MR. SIEGEL: They are consecutively numbered.

MR. GENTILE: Then mine is cut off.

MR. DREWITZ: 40807.

MR. GENTILE: The other one is 08?

MR. DREWITZ: That's correct.

MR. GENTILE: I notice they are not signed. Are they customarily signed at the end?

MR. DREWITZ: Only the last page of the minutes.

MR. GENTILE: This is not the last page?

MR. DREWITZ: No.

MS. WEINER: Let us continue.

MR. SIEGEL: To clear up something, would you be the best person to explain the previous change in supervisory authority when the supervision of the internal department staff was transferred to Mr. Salz or would Frank be?

MR. DREWITZ: Because of what we consider improper supervision of the staff, we gave Joe Salz the title or the authority to supervise all the personnel that was taken away from Mr. Solimino.

MR. SIEGEL: Do you remember when?

MS. BAISI: That was in November of 1981.

MR. GREENBERG: No. November, 1980.

MS. BAISI: November, 1980. I'm sorry.

MR. SIEGEL: You worked with Angelo.

Would you describe his supervisory abilities and limitations and his general work ability and limitations?

MR. GENTILE: Before he does that, I want to say Mr. Beiter might be considered in competition with Mr. Solimino for the job in the Mortgage Department.

MS. WEINER: Accepted.

MR. BEITER: Most of what I have to say is in the evaluations I turned in on Solimino each year. His basic failure as far as I was concerned was an inability to exercise his authority over his subordinates. He's a nice guy and that's how he ran it. Job performance for the most part wasn't bad. The weak part, there was – he did not take to new changes readily. We had a lot of changes in the law in the past six, seven years affecting mortgages. We had to rely more on Mr. Chin, who was his assistant, for directing whatever changes there were. His greatest value to me was as a P.R. man, was as a stand-in between myself and the builders, brokers, lawyers. He did extremely well there. Over all I would say it was a fair evaluation.

MR. SIEGEL: Did Mr. Solimino get to read his evaluations?

MR. BEITER: He was given an opportunity. Most of the time he chose not to read them.

MR. SOLIMINO: Because it had the same thing down there every year. "He refuses to exercise his authority with the girls," which is a dirty rotten lie.

MR. BEITER: I take exception to that.

MS. WEINER: You were given the opportunity to read your evaluations?

MR. SOLIMINO: That's right.

MS. WEINER: It was your prerogative to either agree or not to agree, but you chose not to read them at all?

MR. SOLIMINO: Yes, because it was the same thing every year.

MS. WEINER: I wanted to know whether you were given the opportunity.

MR. SOLIMINO: Yes, I was.

MR. GENTILE: I would like to know whether or not Mr. Beiter as Mortgage Officer was not charged with the overall discipline in his department.

MS. WEINER: You want to answer that?

MR. BEITER: I was charged with overall supervision of the department, yes. Because of the function of my job I had to delegate immediate supervision of the employees to someone else. Particularly toward the end, half my time wasn't spent in the building I worked in. It was spent in the main office.

MR. SIEGEL: Why?

MR. BEITER: My primary function as a member of the Loan Committee, two or four members, authorized members, can hold a meeting and we did daily. Mr. Drewitz and myself were the main participants in that meeting. Because of the overriding importance of his job, those meetings were held in his office most

of the time. Consequently, it meant I had to either pick up the work and go to the main office or report there directly. Approximately half a day or half of every working day was spent in the main office. The other half I did spend back in my office, but by the time you get back and set up the work for processing, answering your phone calls and everything else, there isn't much time left in your day.

MR. SIEGEL: In addition, when you were not in your office, what were Angelo's functions to have been?

MR. BEITER: He was to take my place.

MR. SIEGEL: Did he?

MR. BEITER: Obviously, in the opinion of management, no.

MR. SIEGEL: What was not done when you were not present?

MR. BEITER: Mainly to maintain the discipline and maintain the work flow.

MR. SIEGEL: Would you explain what was and was not done?

MR. BEITER: We've gone though a period of a lot of changes in the law which necessitated a lot of changes in our paperwork, increasing it dramatically. He just didn't get that work flow through on a smooth basis. We have a rough system which does not adapt itself readily to the laws, so it is awkward at best, but still and all it is manageable to some degree.

MR. SIEGEL: As to decision making when you were not present, would you explain if there were any bottlenecks in that?

MR. BEITER: Decisions go back to my original complaint to him. He would defer them until he would get back to the office.

MR. SIEGEL: What kind of decisions were deferred?

MR. BEITER: Anything that came up.

MR. SIEGEL: Give us some examples.

MR. BEITER: I can't think of anything, any particular instance off the top of my head.

MR. GENTILE: Mr. Beiter, weren't you jealous of his prerogatives as Mortgage Officer and very often would not permit him to make decisions?

MR. BEITER: No. No way. That's something I never denied any of my subordinates.

MR. GENTILE: Were there any disciplinary problems with any personnel? Give us some instances. Where was the insubordination?

MR. SIEGEL: Nobody every said there was.

MR. GENTILE: No, Mr. Siegel. Listen to the testimony, sir. There was an allegation that they could not control the personnel.

MR. SIEGEL: And get the work done.

MR. GENTILE: I would like to know what instances. Anyone who didn't do their work is insubordinate. I would like to know where the complaints were.

MR. BEITER: It is a rather broad interpretation of insubordination. I wouldn't call it that or maybe it is, when you come down to it. If some people are capable of doing certain functions and they won't permit themselves to be trained for others or they refuse to go on to others, personal preference or lack of ability—it did happen among some of the Clerks. Some of them did not want to change jobs and resisted any change.

MR. SIEGEL: In addition, isn't the staff reduced now from what it was before in the Clerk/Typist areas? Explain how much smaller it is.

MS. BAISI: We took one Clerk, namely Amy Shields. We had no work for her. We didn't want to fire her or lay her off, so we put her into the Labor Service Department. She was a full-time person.

MR. GENTILE: Was she competent in Mortgage Originations? Could she handle that?

MS. BAISI: Yes.

MR. GENTILE: Was there anyone else?

MR. SIEGEL: She is still speaking.

MR. GENTILE: May I ask her—

MS. WEINER: I told you to please hold any questions you had until the person who was speaking was finished.

MR. GENTILE: I have not cut her off.

MS. WEINER: Answer this question and then please proceed to finish whatever you are going to state.

MS. BAISI: Let me start from the beginning. Mary Klecar, she has an overflow of people and the work has diminished quite a bit. She asked could I use someone or she'll have to lay them off. I said we can certainly use them in another department. I called another department head and he said yes. Unfortunately this other girl left, so in her place we hired a part-timer.

MR. SIEGEL: You had two full-timers. One left, one was transferred to another area outside Mortgage Originations and you replaced the two full-timers with one part-timer.

MR. GENTILE: Who was the other full-timer?

MS. BAISI: Kathy Miller.

MR. GENTILE: Was she competent?

MS. BAISI: Very much so.

MR. GENTILE: Is she working now?

MS. BAISI: She left.

MR. SIEGEL: When did you hire that part-timer?

MS. BAISI: Recently.

MR. SIEGEL: How old is she?

MS. BAISI: 66 years old.

MS. WEINER: I want you to know that even though you have an attorney you are free to speak, Mr. Solimino.

MR. SOLIMINO: I know.

MS. WEINER: Have you completed what you were going to say?

MS. BAISI: Yes.

MR. GENTILE: Can we stay on the same subject or can we ask some questions?

MS. WEINER: Before you ask any questions, stay on the subject and then I am going to ask some. Go ahead.

MR. GENTILE: I will defer to you.

MS. WEINER: If everyone has spoken and this is what you consider the answers to the complaint, the allegations of the complaint, is there anything further that you wish to say before Mr. Gentile has his opportunity to speak and ask questions?

MR. SIEGEL: There was something else. Before we spoke about Ed Price's functions as a fill-in.

MR. GENTILE: I did not hear Price mentioned before.

MR. SIEGEL: Before we got here.

Would you speak about Ed Price and his function?

MR. BEITER: Mr. Price was formerly my assistant. I worked in another department years ago.

MS. WEINER: When you say assistant, was he of the same capacity?

MR. BEITER: I was head of the Mortgage Service Department. I was also a Vice President then. Price was my assistant. At the time when Mr. Drewitz was made President and I became Mortgage Officer, I was removed from that department and given the Origination Department and Mr. Price succeeded me in the other capacity. He happens to be an intelligent and aggressive young man. We were both very close and I relied on him heavily. Because I perceived what I felt at that time was a weakness on Angelo's part to enforce his own authority, I advised Mr. Price that if I wasn't around, because at that time we all worked in the same office, that it would be perfectly alright for him to run both sections, if he would not make a decision, that he should go in my place and make one.

MS. WEINER: Was he considered of higher rank than Mr. Solimino?

MR. BEITER: He wasn't at that time. He was made a Vice President at that time.

MS. WEINER: They were considered equal?

MR. BEITER: He would be slightly higher. He headed up his on section.

MR. GREENBERG: Mr. Price was not.

MR. GENTILE: He was junior to Mr. Solimino?

MR. GREENBERG: That's right.

MR. BEITER: In title.

MR. GREENBERG: In title.

MR. BEITER: At the time he was Assistant Vice President.

MS. WEINER: What I was looking to find out was at the time he was given the back-up authority he had a lower title in fact?

MR. BEITER: I will stand corrected. He had a lower one.

MR. GENTILE: When you came from Mortgage Service and were elevated or promoted to Mortgage Officer that meant you went to Mortgage Origination, is that correct?

MR. BEITER: Yes.

MR. GENTILE: Were you at that time familiar with Mortgage Origination?

MR. BEITER: I was to a degree, yes. I didn't work in it.

MR. GENTILE: Did someone have to help you in Mortgage Origination when you started?

MR. BEITER: Of course, yes. Mr. Solimino did.

MR. GENTILE: Prior to your being Mortgage Officer, who was it?

MR. BEITER: Mr. Drewitz.

MR. GENTILE: He left the Mortgage Department when he became President, is that correct?

MR. BEITER: Yes.

MR. GENTILE: Mr. Drewitz was the most qualified person here to know about Mortgage Origination at that time, isn't that correct?

MR. BEITER: Yes.

MR. GENTILE: Probably still knows a great deal about it?

MR. BEITER: Yes.

MR. SIEGEL: When you had questions, did you go to Angelo after a while or Mr. Drewitz?

MR. BEITER: I would ask Mr. Drewitz.

MR. SIEGEL: The last seven or eight years, did you go to Angelo for your questions?

MR. BEITER: No.

MR. SIEGEL: Why not?

MR. BEITER: You are asking me if I asked questions?

MR. SIEGEL: Asked Angelo questions on how to run the department, mortgages and writing mortgages.

MR. BEITER: As to how our department was running, yes. How things are going on inside and what's affecting them inside, yes, I did, but as far as how to operate the Mortgage Originations Section, no. I would ask him if he had suggestions, changes, if he wanted anything changed.

MS. WEINER: Is that the question?

MR. GENTILE: There are more questions.

MR. SIEGEL: Did he made beneficial suggestions?

MR. BEITER: Not too many, no.

You and I are going to get into an argument.

MS. WEINER: I won't allow any arguments here.

MR. SOLIMINO: How about when you were on the phone and you'd have to get off the phone and run into me and ask me how you should answer the questions they were asking you on the phone? Do you remember that?

MR. BEITER: What do you mean?

MR. SOLIMINO: When you first took over as Mortgage Officer, did you ever have to put down a phone and ask me what you had to say?

MS. WEINER: May I ask what type of questions?

MR. SOLIMINO: Mortgage questions. Mortgage Origination to create loans.

MS. WEINER: Is that clear?

MR. SOLIMINO: Did you ever have to come out and ask me?

MR. BEITER: I can't remember any.

MS. WEINER: How long ago was this?

MR. SOLIMINO: Only about eight years ago. He's a young fellow yet. He shouldn't forget.

MR. SIEGEL: Sarcasm isn't necessary.

MR. SOLIMINO: He should remember.

MR. SIEGEL: Within the last five years has he come to you and asked you the same kind of questions, the last four years?

MR. SOLIMINO: Once in a while.

MR. BEITER: Who taught you when you were brought up? Who helped you if you –

MR. SOLIMINO: It wasn't you.

MS. WEINER: Excuse me one moment. The complaint of the charge of discrimination is not being considered for eight years ago.

MR. SOLIMINO: Yes, it is, because here they're telling me that I was ineffective for eight years. They're telling me I was ineffective for eight years.

MS. WEINER: But you state you were in the position of Vice President, you were no longer needed as Vice President and that's when you filed your complaint.

MR. SOLIMINO: That's right.

MR. GENTILE: That is not accurate. We have no knowledge of whether it is bird, fish or beast. We don't know Mr. Solimino's present status, whether he was discharged, fired, retired or resigned and we would like to have clarification from Mr. Drewitz.

MS. WEINER: We will get to that. The thing is whatever happened eight years ago is really not included into the charge of discrimination that has been filed.

MR. GENTILE: All right.

MS. WEINER: Is that understood? Did you wish to say anything else?

MR. SOLIMINO: No.

MR. SIEGEL: We might as well clarify that point.

Would you explain after the decision was made to eliminate the second Vice President's slot what happened?

MS. WEINER: Before we go into that, are you now answering to a question he wanted asked about what happened?

MR. SIEGEL: I was going to ask it anyway.

MS. WEINER: Then let us allow Mr. Gentile the right to say and state his remark as he wishes to put it.

MR. SIEGEL: Okay.

MR. GENTILE: The whole thing boils down to what was the Astoria Federal's position as to Mr. Solimino's separation from Astoria Federal, what is it now, what was it then, and I direct it to Mr. Drewitz.

MS. WEINER: I think –

MR. GENTILE: Let Mr. Drewitz answer.

MS. WEINER: Take it chronologically.

MR. GENTILE: We want to know what it is now.

MS. WEINER: I would like to hear the answer and then whatever I feel necessary to state, I will state.

MR. DREWITZ: After the Board meeting where we discussed the changes –

MR. GENTILE: What Board meeting was this?

MR. DREWITZ: February 17th. After the Board meeting on Wednesday, the 17th of February, I called Angelo into my office and discussed the findings with him.

MR. GENTILE: What day was this?

MR. DREWITZ: That was on the 19th of February. February 19th, I called him into my office to discuss what we had discussed at the Board meeting and he was very well aware that the work load at the department had diminished extremely much because of high interest rates, so our lendings had taken quite a nose dive. Obviously there was no need for having a second Vice Presidency in the office and I told him that in my opinion it would be a long time before mortgage lending would reach plateaus that it was in in the past, so I gave him the option, Number 1, for a transfer into another department. I told him, "You know operation. Tell me what you think you could be qualified for to go into another department and we'll give it very serious consideration or you can take early retirement," so Angelo told me right off the bat that he has no interest in any other work and he only loves mortgages and he would go for early retirement, so in order to implement a retirement, we had to get him to sign an option agreement, which he refused to sign. He said he wanted first to discuss it with his attorney. I said, "You go right ahead," and at this point he never signed anything,

so obviously the pension was never implemented. Our Board also approved supplementary benefits for him until he became 65 years of age. The benefits were 70 percent, that he would get a supplemental payment that would give him an income equal to 70 percent of his current income and he asked if that could be increased. I brought it up at the next meeting and the Board decided to go to 75 percent of his total compensation package which would continue until he's 65, at which time it would phase out because Social Security payments would take over. So at this point, he didn't sign anything, he didn't do anything, so at his own option –

MR. GENTILE: He still has an option to transfer, Mr. Drewitz?

MR. DREWITZ: At this point, I would say no.

MR. SIEGEL: But at that point he did?

MS. WEINER: At the time that he spoke to Mr. Drewitz he had the option of transfer.

I would like to know from Mr. Solimino is that how it went down?

MR. SOLIMINO: No. He never, never mentioned a transfer to any department.

MS. WEINER: Would you please indicate for the record what did happen?

MR. SOLIMINO: I went there. I sat down. He was very, very nervous and fidgety and he says, "You know that the Association lost $2,000,000.00 last year," which actually was $1,600,000.00 to be exact, and he says, "My projection is that we'll lose between five and $8,000,000.00 this coming year, so we discussed it with the Board," he said, and he never, never mentioned anything about transferring to another department. He just said that they were forcing me to retire.

MR. DREWITZ: That's not true.

MR. SOLIMINO: It definitely is true. I am under oath.

MR. DREWITZ: So am I.

MR. SIEGEL: Did you have any other meetings with representatives of the bank regarding transferring or retirement?

MR. SOLIMINO: Yes.

MR. SIEGEL: When was that, sir?

MR. SOLIMINO: With Rhoda, when she came down. That was on March 3rd or March 4th.

MR. SIEGEL: Did you have any other meeting at which both Mrs. Baisi and Mr. Drewitz attended?

MR. SOLIMINO: Yes. On Friday. It would be March 5th.

MR. SIEGEL: Was transferring brought up at that time?

MR. SOLIMINO: I refused to sign a letter he wanted me to sign.

MR. SIEGEL: Was your ability to transfer brought up at that time?

MR. SOLIMINO: No.

MR. SIEGEL: Not at all?

MR. SOLIMINO: No. Never. I brought it up.

MR. SIEGEL: You asked if you could have a transfer? What did you say?

MR. SOLIMINO: Miss Baisi came down to my office. She said, "I have your supplement here. If you sign a letter you can have your supplement." So I read the letter. I never was offered another job and they said that was my prerogative, to retire. Actually they were forcing me to retire.

MR. SIEGEL: Was there ever a discussion at which –

MR. SOLIMINO: Let me finish.

MR. SIEGEL: – a transfer was brought up?

MR. SOLIMINO: So I read the letter. So Rhoda – may I call you Rhoda?

MS. BAISI: You may.

MR. SOLIMINO: I said, "I don't sign a pack of lies." She said, "What do you mean lies?" I said, "I wasn't offered another job and I didn't volunteer to retire. I was forced to retire." She did try to convince me that I was offered another job, but then in turn I convinced her that I wasn't, so she said to me, "Well, would you consider transferring to another department?"

MR. SIEGEL: What did you say?

MR. SOLIMINO: I said, "Rhoda, make an offer."

MR. SIEGEL: That is exactly what you said?

MR. SOLIMINO: Exactly, word for word. I says, "Make an offer." She said, "I don't know what department you want to go to."

Am I right or wrong?

MS. BAISI: Almost right. You said, "What else do I know besides mortgages."

MR. SOLIMINO: I did not say that.

MS. BAISI: That's what I remember you said, Angelo.

MR. SOLIMINO: So I said, "Make me an offer." She said, "Well, I don't know what department you'd like to go to." I says, "You mention it. Make me an offer." She says, "How would you like to have a job maybe as a branch manager?" I says, "Good. You made an offer." I says, "Number 1, what does it pay?" She says, "Between twenty and twenty-two five a year." I says, "Okay. What happens to my title?" She says, "Your title will be taken away then."

MR. SIEGEL: What did you say?

MR. SOLIMINO: I got up and I took the letter from my desk. I went downstairs and made a photostatic copy of the letter because I wanted to take it home to study and she wouldn't allow me to.

MR. SIEGEL: Did you answer about the transfer or did you suggest another department?

MR. SOLIMINO: No.

MR. SIEGEL: Can you think of another department you would have been well suited to?

MR. SOLIMINO: How about when Joe Salz was taken out of the Woodside office. He wasn't given a choice. He was just told he had to be transferred. If I was told to transfer to another department, I'd have to do it or be fired. I was not.

MR. SIEGEL: You were.

MR. SOLIMINO: I was not offered another job.

MR. SIEGEL: Sir, did you answer then with an option?

MR. SOLIMINO: No, I didn't, because it wasn't offered to me.

MR. SIEGEL: On Friday, the March 5th meeting, was a transfer discussed?

MS. BAISI: Yes.

MR. SIEGEL: Do you remember what was said?

MS. BAISI: I remember Mr. Drewitz said we did offer you – you probably did say it, but –

MR. GENTILE: Let's here what you say he said, please.

MS. BAISI: We went over the letter and he said, "Henry, you never offered me a position." He said, "Yes, I did." "No, you didn't." It was going back and forth. He said, "Maybe with all the confusion I was nervous, I didn't hear you."

MS. WEINER: Mr. Drewitz, did you offer the complainant at any time another position?

MR. DREWITZ: Yes, I did.

MS. WEINER: What was the position?

MR. DREWITZ: Let me qualify that. I told him he's been with Astoria for thirty some odd years. He should let me know what department he feels qualified in and let me know and we certainly would give him serious consideration for transfer to that department, so he told me very emphatically he has no interest in any other work. His first love or work, to that effect, was mortgages, and he would opt for early retirement.

MS. WEINER: We have his version and we have your version.

Just before a statement was made if he were not offered a position or a transfer and if he were offered one now would he accept it and the remark was made at this time he would not be offered another position.

Could I ask if the reason for that statement is because he has filed a complaint with the Division of Human Rights or what would be the reason? If there was a misunderstanding at that time and it is clarified at this time, why would a position not be offered at this time?

MR. DREWITZ: Number 1, with the hold we have on personnel we have no department openings at the present time. Rhoda knows we have an absolute freeze on personnel with the exception of Tellers, maybe a Clerk/Typist, that's about the only thing, but any executive staff, we're not taking on anybody in any kind of executive position and frankly I'm not very pleased about this whole mishmash.

MR. GENTILE: Mr. Drewitz, I have known you about thirty years and I have known you mostly in an executive capacity at Astoria and as a friend.

Were there many times when money became very tight at Astoria and all the other institutions had a freeze on mortgages in the past when Astoria's resources were nowhere as near as great as they are now or Astoria's pre-eminence in the mortgage field wasn't as great, did you reduce any personnel from the Mortgage Department?

MR. DREWITZ: It's hard to say at this point what we might have had, some attritions, some retirements, or somebody leaving.

MR. GENTILE: In the Mortgage Department?

MR. DREWITZ: Yes. I just can't think offhand. We always had a certain amount of turnover of some girls or so—

MR. GENTILE: We are talking about officers.

MR. DREWITZ: I can't think of it momentarily.

MS. WEINER: If there was a misunderstanding, Mr. Solimino, about being offered a job, in fact maybe—it was said there was an offer, if there was a position offered to you, did you state your desire for the transfer or to which department you would wish to be transferred?

MR. SOLIMINO: No, I didn't.

MS. WEINER: Okay. Anything further?

MR. GENTILE: Yes. I have a question.

MS. WEINER: Go right ahead.

MR. GENTILE: Mr. Siegel, you prepared a response for the respondent, a three and a half page letter?

MR. SIEGEL: I am counsel for the respondent. I am not here to testify, nor will I.

MR. GENTILE: Is Mr. Drewitz familiar with the letter you prepared?

MR. SIEGEL: Attorney/client privilege.

MR. GENTILE: Are you familiar with the letter?

MR. SIEGEL: Attorney/client privilege. If you want to ask whether he has seen the letter —

MR. GENTILE: I want to know whether he is familiar with it and subscribes to it. I think he is chargeable with it. I would like to know if he is.

MS. WEINER: Are you familiar with the response that was offered by your attorney to the Division?

MR. DREWITZ: Yes.

MR. GENTILE: Do you subscribe to the position taken by that letter?

MR. DREWITZ: What are you specifically referring to?

MR. GENTILE: The contents of the letter.

MR. DREWITZ: Of course I do.

MR. GENTILE: One thing that was said in the letter was that once the business related decision was made to eliminate Mr. Solimino's position, he was offered the opportunity to bid for any vacant position for which he was qualified. Such a transfer would have been without prejudice to his accrued seniority or benefits. Nonetheless he refused.

Do I understand that to mean he would have equal pay for any transfer he had?

MR. DREWITZ: No.

MR. SIEGEL: It says exactly what it says. Accrued seniority and benefits. It didn't say wages. It said accrued seniority or benefits.

MR. GENTILE: What does the Human Rights Division read in that letter?

MS. WEINER: I do not wish to comment on that. It is not my place to comment.

MR. SIEGEL: Frankly there could be no way of knowing until he transferred. He could have transferred to some lateral position, to a lower position. You couldn't know until the transfer was completed. In the past people have transferred to lower positions and received lower salaries. It depends where you wind up.

MR. GENTILE: In other words, the transfer would have been prejudicial perhaps to his income.

MR. SIEGEL: We have no way of knowing, because he did not transfer. All we know is he would not have lost seniority or pension benefits.

MR. GENTILE: What does seniority mean?

MR. SIEGEL: Tenure, years of service with the Association.

MR. GENTILE: Does seniority mean rank?

MR. SIEGEL: No. Titles mean rank. Seniority means seniority. Like in a union shop, seniority means seniority. Simple precise terms.

MR. GENTILE: Mr. Drewitz, wasn't it Mr. Solimino's function not only as a P.R. man but as a business getter from various sources?

MR. DREWITZ: No, he wasn't.

MR. GENTILE: He was not popular with people who dealt with Astoria Federal?

MR. DREWITZ: He was, but he never went on the field to gather any business. He was strictly an in-house man. He didn't solicit or call or leave the office.

MR. GENTILE: Wasn't he always busy on the phone? Everyone asked for Mr. Solimino?

MR. DREWITZ: He had a certain amount of following, yes.

MR. SIEGEL: The simplest question is now that he is gone and your staff is down to one full-time officer, is there a hole missing because he is no longer there?

MR. DREWITZ: Not at all.

MR. BEITER: The office is functioning.

MR. GENTILE: I would like to know if anybody else was severed for business reasons.

MS. BAISI: The whole department was reconstructed.

MR. GENTILE: Who was severed for business reasons?

MR. WEINER: Has anyone else been terminated?

MS. BAISI: There were transfers.

MS. WEINER: No one else terminated?

MS. BAISI: No.

MS. WEINER: I would want now for the record a reply to the respondent's reply upon belief that "had I been a younger staff officer I would not have been forced into early retirement." I would just like a reply to that.

MR. SIEGEL: Can I provide that?

MR. GENTILE: No. Mr. Drewitz, I would say.

MS. WEINER: Let me hear from the attorney.

MR. SIEGEL: Regardless of Mr. Solimino's age, he would not have been treated any differently. In fact, he would have been terminated instead of being offered the option of a lucrative early

retirement. The situation was such that two Vice Presidents were not required, that his abilities were less than Mr. Beiter's and he would serve as the sole Vice President. Miss Klecar, who was age 52, was deemed to be more qualified to do the role of Mr. Salz and Mr. Solimino and the department now functions with three instead of four. Had he been younger, he would have been fired straight out because he wasn't deemed qualified. However, he was offered this in recognition of the fact that he had been with the Association a long time and it was determined that a reward would be appropriate and that's what was offered.

MS. WEINER: Would you like to answer?

MR. DREWITZ: I think it's a feeling of compassion for the amount of years he had with us and nothing else but. Mr. Solimino, his performance as a Vice President fell way short of the mark and he was not an effective supervisor and he was not an effective representative of the Association in the absence of Mr. Beiter. The question of age discrimination doesn't even come into the picture here. We have many, many people on our payroll way older than Mr. Solimino. I'm only a few years behind him. I'm 60 years of age myself. If I had that policy, I'd be against myself. I, personally speaking, have a preference for more mature and older workers because generally speaking I think they're more reliable.

MS. WEINER: Then it is my understanding that had he been a younger staff officer he would have just been terminated?

MR. DREWITZ: That's right.

MR. SIEGEL: He would not have been offered early retirement.

MR. GENTILE: Mr. Drewitz, who would be now in the last few months or year more qualified in Mortgage Origination; Mr. Solimino or Mr. Chin?

MR. DREWITZ: Their functions were not exactly parallel.

MR. GENTILE: Mr. Chin is in the Mortgage Origination Department?

MR. DREWITZ: Yes. I would say Mr. Chin is every bit the equal of Mr. Solimino.

MR. GENTILE: When was he brought in?

MS. BAISI: 1977.

MR. GENTILE: Mary Klecar and Mr. Solimino, who would be more qualified?

MR. DREWITZ: Mary Klecar by far.

MR. GENTILE: I am asking about Mortgage Origination.

MR. DREWITZ: I would say they're on a par.

MR. GENTILE: Would you agree to that, Mr. Beiter?

MR. BEITER: Yes.

MR. DREWITZ: She's a super woman.

MR. GENTILE: She was brought in to replace Mr. Solimino?

MR. DREWITZ: She came in originally to replace Mr. Salz who was transferred to the main office. There was a turn around. She was at the main office, Salz was at Woodside, so we transferred them around.

MR. GENTILE: Did anybody ever ask you to have Mr. Solimino transferred to his department?

MR. DREWITZ: No.

MS. WEINER: Do you have anything you wish to say, or Mr. Solimino, in reference to Part 3 of your allegations?

MR. SOLIMINO: I'd like to direct my question to Mr. Greenberg, please.

MS. WEINER: Go ahead.

MR. SOLIMINO: What did you know about Mortgage Originations?

MR. GREENBERG: In terms of actually originating?

MR. SOLIMINO: What takes place in the Mortgage Department.

MR. GREENBERG: I could not originate a loan.

MR. SOLIMINO: Who did you speak to when you came down to make your survey?

MR. GREENBERG: Joe Salz.

MR. SOLIMINO: Does he know mortgages, the operation?

MR. GREENBERG: Yes. He seemed to know the operation of the department fairly well.

MR. SOLIMINO: He didn't know the first thing about Mortgage Originations, so how could you go down there and ask him for advice and you write out a resume, as you did, when neither one of you knew what the heck you were doing?

MR. GREENBERG: Joe was not the only one I spoke with.

MR. SOLIMINO: Who did you speak to?

MR. SIEGEL: Let him finish.

MR. SOLIMINO: I'm sorry.

MR. GREENBERG: I also spoke with Rhoda, the Director of Personnel. I spoke with our attorneys.

MR. SOLIMINO: What does Rhoda know about Mortgage Originations?

MR. GREENBERG: I don't know what she knows. I was interested in the key to problems there.

MR. SOLIMINO: How did you get a true evaluation?

MR. SIEGEL: We're speaking apples and oranges.

MR. SOLIMINO: Give me a chance to speak. Your client spoke.

MR. SIEGEL: You are entitled to the same opportunity.

MR. SOLIMINO: All right. How can you write up an evaluation when neither one of you knew what the heck you were doing?

MR. GREENBERG: I didn't write up an evaluation.

MR. SOLIMINO: I can tell you right now —

MR. GENTILE: You did not write up an evaluation?

MR. GREENBERG: No. Your client is trying to tell me that I wrote an evaluation of how the Mortgage Originations Department was working and not working. If you recall earlier what I said was there was so many personnel problems, personality conflicts, that I couldn't get into the work flow analysis because what should work on paper wouldn't work because this Clerk, when she was finished, would sit there and not go over and help the other one, so I didn't get into that work flow analysis. I could only do a very broad brush on what seemed to be the original problem, and I addressed that problem by saying they needed effective supervision.

MR. GENTILE: Did you get into the fact that a great many appraisals or offer commitments were not taken up because you weren't competitive with Greenpoint Savings Bank?

MR. SIEGEL: Objection.

MS. WEINER: We don't need objections here.

MR. GENTILE: Did you find anything out about that?

MR. GREENBERG: No.

MR. GENTILE: May I ask Mr. Drewitz some questions?

MS. WEINER: Yes.

MR. GENTILE: I have here a copy of a memorandum dated January 18th, 1982, which I first would like to give to you because I do not think they have that.

MS. WEINER: Is this going to be made part of the file?

MR. GENTILE: Yes. I'd like Mr. Drewitz to comment on it.

MS. WEINER: Then we have to allow him to read it.

You are submitting this for what reason?

MR. GENTILE: The reason being this is dated January 18th. It's a memorandum from Mr. Drewitz, the Chief Executive Officer, and it's addressed to Mr. Beiter and Mr. Salz. It does not mention Mr. Solimino in any way, shape or form. The subject is speed-up on loan appraisals. It admits about losing a great deal of business to the Greenpoint Savings Bank and it shows that in Mr. Drewitz's mind, or at least I suggest in his mind, you already had eliminated Mr. Solimino from the department because there is no mention at all, no criticism of Mr. Solimino's ineffectiveness or anything else. This is prior to the Board meeting in February.

MS. WEINER: I understand.

MR. GENTILE: He was an active member who outranked Mr. Salz at the time. He was more involved in obtaining appraisals for mortgage financing than anyone else. It does not refer to the lack of direction and motivation caused by ineffective supervision reported by Mr. Greenberg in the Director's minutes. He does show one thing. He suggests they go to Security Title, which I suggest is why Astoria was slow many times because Security was slow all the time. Just a suggestion, I like Security, but I had to use other companies because they were too slow.

Can Mr. Drewitz answer the question? I notice also a copy was given to Mr. Greenberg, is that right?

MR. GREENBERG: It says so on there.

MR. GENTILE: Look at it, please, Mr. Greenberg.

MR. GREENBERG: Can I ask who wrote the BCC on it?

MS. BAISI: Elena does that.

MR. GREENBERG: I guess I got it then.

MR. GENTILE: Do you know that letter?

MS. BAISI: No.

MS. WEINER: Do you wish to answer any of the questions?

MR. DREWITZ: The only thing I can say was it's a secretarial oversight. I send out many memorandums. Sometimes my secretary could have missed it and sometimes that happens and I even eliminated Frank Beiter once.

MR. GENTILE: It was not on your mind that time to sever Mr. Solimino from the operation, is that what you are saying?

MR. DREWITZ: Not at that time.

MR. GENTILE: This was prior to your investigation, January 18th?

MR. GREENBERG: I believe it was after. Maybe I can help you with the investigation. The idea to take a look at – investigation is really not what – the intent of what I did was to take a look and see if I could smooth out the department in the fall, October, November, that kind of time frame, of 1981.

MR. GREENBERG: Frank came up with a proposal we get some type of computer to process loan closings and that was the real reason I went looking into the department.

MR. GENTILE: Do you have expertise with computers?

MR. GREENBERG: Yes, I have some. The idea was to see what the work flow – how the work flow would fit into the computer. My initial reaction was you need a computer because by the time you punch all this stuff in you'll have to punch it out until you get the internal systems straightened out and that was the beginning of me looking into the department.

MR. GENTILE: Are you familiar with the Greenpoint operation?

MR. GREENBERG: Not at all.

MR. GENTILE: Are you, Mr. Drewitz?

MR. DREWITZ: Not too much, no.

MR. GENTILE: They eliminate credit reports.

MR. DREWITZ: That, I am aware of.

MR. GENTILE: That has helped hurt you.

MR. DREWITZ: They're a State chartered institution. They can do things which we can't do.

MR. GENTILE: You also request employment letters which a lot of people hate to sign, but you request it and that's not forced upon you, is it?

MR. DREWITZ: No, but I think it's good lending practice.

MR. GENTILE: That's what hurt you, your mortgage business also.

MS. WEINER: That is not what we are here for.

MR. GENTILE: He got complaints Astoria wasn't competitive and he wasn't listened to, is that true?

MR. SOLIMINO: Definitely.

MR. GENTILE: There were more points, higher interest rates, and Mr. Beiter was another advocate of higher interest rates.

MR. DREWITZ: We don't control interest rates.

MR. SIEGEL: Unless we are suggesting the Association was willing to lose millions to make him expendable for firing –

MR. GENTILE: He did not blame Mr. Solimino for business slowing down. He blamed the slow down on appraisals. They were getting the appraisals out. People weren't picking up the commitments when they found out they could do cheaper elsewhere.

MS. WEINER: I believe we have covered –

MR. SOLIMINO: I would like to ask a question.

How many times did I come in and suggest to you we call up the appraisals before this letter was even sent out – call up the people who requested appraisals, instead of writing up eleven sheets of paper on the history of the account, and that work was all wasted. The people didn't pick them up. One out of maybe ten would pick up the commitments, right?

MR. BEITER: You wanted to do this constantly. The system we had in there was the best we could comply with the requirements of RESPA.

MR. SOLIMINO: What would be your remark when I'd come in and give you advice as to how it should be done? What was your answer?

MR. BEITER: If it doesn't work out under the context of those laws, we can't do it. I'd love to do it, but we can't.

MR. SOLIMINO: You used to tell me you were the Mortgage Officer and you run the office.

MR. BEITER: That's true.

MR. SOLIMINO: You never took my suggestions.

MR. BEITER: I would not take a suggestion contrary to the law.

MR. SOLIMINO: Can I direct a question to Mr. Drewitz?

MS. WEINER: May I ask if Mr. Beiter has completed what he has to say?

MR. BEITER: In response to his latest one, yes, it's my department and I'll operate it to what I consider the mandates and the laws we operate under. Some of his suggestions, although I appreciated them and I had a lot of the thoughts myself, they just would not be in compliance with the laws, so they weren't used.

MS. WEINER: Do you wish to proceed, Mr. Solimino?

MR. SOLIMINO: Henry, I was on the Loan Committee, right?

MR. DREWITZ: That's right.

MR. SOLIMINO: Mr. Beiter said he spent a lot of time down at the main office on the Loan Committee.

What happened when you and I were on Committee? There was just three of us on the Loan Committee, you, myself and Frank, right?

MR. DREWITZ: Yes.

MR. SOLIMINO: You used to look at your watch and say, "My God, when you and I are on Committee we get finished in a half hour. I was back in the office in an hour. What is he doing there all day then?"

Can you explain that?

MR. DREWITZ: Sure, I can, for the simple reason Frank Beiter and I discuss various other aspects of the organization I wouldn't discuss with you.

MR. SOLIMINO: Sometimes you take so damn long when you're on Committee with Frank; did you ever say that to me?

MR. DREWITZ: Yes.

MR. SOLIMINO: Okay.

MS. WEINER: Is there something Mr. Gentile wants to say?

MR. GENTILE: Yes. I would like to ask Mr. Drewitz to explain this notice.

MR. DREWITZ: All right.

MR. GENTILE: That is dated what day, Mr. Drewitz?

MR. DREWITZ: February 24th.

MR. GENTILE: It appears you considered it an accomplished fact that he had retired.

MR. DREWITZ: So he told me. He told me he was taking an early retirement and he wanted it to be known the retirement was of his own choosing.

MR. GENTILE: Did he write that letter?

MR. DREWITZ: No.

MR. GENTILE: Who wrote that letter?

MR. DREWITZ: Who signed it?

MS. BAISI: Lena.

MR. GENTILE: You wrote that letter?

MS. BAISI: No, I didn't.

MR. GENTILE: You authorized it?

MS. BAISI: No.

MR. DREWITZ: I do my own letters.

MR. GENTILE: But that was posted in all the branches before you even worked out a suitable compensation for Mr. Solimino.

MR. DREWITZ: Angelo wanted that on the bulletin board.

MR. SOLIMINO: No. I said I didn't want a notice, Henry.

MR. DREWITZ: Yes, you did.

MR. SOLIMINO: Oh, the lies are flying here.

MS. WEINER: Excuse me. The memorandum we discussed just before that copies were made and distributed will be known as Complainant's Exhibit 1 entered on 11/29. This notice we are discussing is Complainant's Exhibit 2 entered 11/29. The reason we have to number these exhibits even though I have them, the respondent was not made aware of them before today they were going to be discussed.

MR. GENTILE: I have no objection.

MS. WEINER: I just have to let you know why I am doing what I am doing. I am keeping the originals.

MR. SOLIMINO: May I have a word?

MS. WEINER: Yes.

MR. SOLIMINO: I direct my remark to Henry. That notice there that was posted on the bulletin board, first of all I was against it. Secondly after two days it disappeared and I asked everybody in the department who had taken it down and nobody would admit it was taken down.

For what reason was it taken down?

MR. DREWITZ: I have no idea that was taken down. I certainly gave no orders on that. Why should I put up a notice and then take it down?

MS. WEINER: Is there anyone that wants to say anything about the contents of the memo?

MR. SOLIMINO: Which one?

MR. GENTILE: The notice of your resignation.

MS. WEINER: Do you wish to make any comments about the contents?

MR. SOLIMINO: At first he told me he was going to put up a notice. I told him no. He said, "Well, I'll show you a copy of one," and in it he had put for personal reasons I had requested an early retirement, which was a lie. I never volunteered to retire.

MR. DREWITZ: As a matter of fact, you saw this notice before this went on the board.

MR. SOLIMINO: It was posted on the board.

MR. DREWITZ: I told you exactly what was in there and I got your approval to it because you were very sensitive about it.

MR. GENTILE: Did you remove any fat from other departments, Mr. Drewitz?

MR. DREWITZ: What is fat?

MR. GENTILE: It is a slang word for excess personnel, your tightening of the belt.

MR. DREWITZ: We have had a freeze on hiring. As far as actual termination —

MS. BAISI: Can I answer that?

MR. DREWITZ: Sure.

MS. BAISI: Anyone that left who was on a full-time basis we hired a part-timer to fill in, except Tellers.

MS. WEINER: The people that have left, left of their own volition?

MS. BAISI: Yes.

MR. SIEGEL: I think to clarify it, more simply, is your department during this high interest rate disaster the most severely affected department?

MR. BEITER: Yes.

MR. SIEGEL: Is any other department affected as yours is?

MR. BEITER: No.

MS. WEINER: I think we have covered most everything, unless someone feels there is something that has not been covered.

MR. DREWITZ: I would like to make a comment. Mr. Gentile was questioning Mr. Greenberg's background. I hired Mr. Greenberg. He is a former employee of Pete, Warwick, Michelin Company. He is an extremely competent and brilliant man in his field and he certainly has the capacity to evaluate the operation of a department. As a matter of fact, that was one of his functions at Pete, Warwick, and he was in charge of audits at Astoria Federal for several years prior to joining forces with Astoria, so he has the intelligence, background and ability. The fact he doesn't know the itty-bitty things in structuring mortgages is completely irrelevant.

MR. SIEGEL: What is your title?

MR. GREENBERG: Senior Vice President.

MS. WEINER: Nothing goes after it?

MR. GREENBERG: Senior Vice President. That's enough.

MS. WEINER: In banks usually they say "in charge of".

MR. GREENBERG: Oh. Planning and Development.

MR. GENTILE: You refer to him as your house efficiency expert?

MR. SIEGEL: He refers to him as the Senior Vice President.

MR. DREWITZ: In charge of Product Development and Internal Operations.

MS. WEINER: Is there anyone else who wishes to say anything? Do you Mr. Solimino?

MR. SOLIMINO: I would like to show this to Mr. Drewitz.

MS. WEINER: I will make a copy of this. This is Exhibit C-3.

What about Exhibit C-3, Mr. Solimino?

MR. SOLIMINO: Rhoda should be very, very familiar with this.

What happens when somebody quits their job or is fired? Are they told to sign that form?

MS. BAISI: When they quit their job, yes, not when they're fired.

MS. WEINER: Both times, whether they leave of their own or whether they are terminated, they are asked to sign this form?

MS. BAISI: Not when they are terminated. When they leave on their own, that they separated of their own volition.

MR. SOLIMINO: What is the reason to have them sign that?

MS. BAISI: Just for records.

MR. SOLIMINO: It has nothing to do with unemployment, so they can't collect unemployment? Hasn't it been said to certain employees if they didn't sign that letter they wouldn't get a good reference?

MS. BAISI: Not from the Personnel Department.

MR. SOLIMINO: Would it shock you if I had witnesses to that effect?

MS. BAISI: Certainly. Not from the Personnel Department, believe me.

MS. WEINER: What would be your reason in a charge of age discrimination to need witnesses?

MR. GENTILE: To show the motivation of the respondent as far as regarding help, employees.

MS. WEINER: Would it show he was treated differently because of his age?

MR. GENTILE: It has a bearing on that other letter we had reciting what his great benefits were to be and that has a bearing on it because this is the practice. The practice is to get them to sign while they are weak, so that they cannot dispute it later.

MR. SOLIMINO: Henry, you spoke about seventy percent before, didn't you?

MS. WEINER: Does this have reference to this form?

MR. GENTILE: No. To his offered compensation.

MS. WEINER: We have to finish discussion on this form.

MR. SIEGEL: What is the relevance of this specifically?

MR. GENTILE: I explained it. It has a tie-in with this letter.

MR. SIEGEL: What is the tie-in?

MR. GENTILE: The tie-in being that this letter makes a statement, an untrue statement, that he made a decision to retire rather than transfer to another department.

MR. SIEGEL: And he said it was his recollection at the time that he did say, "I would retire and I don't want a transfer."

MR. GENTILE: To show this is a practice of the respondent.

MS. WEINER: Mr. Solimino, were you given this form to sign?

MR. SOLIMINO: No. I was given the other form to sign.

MS. WEINER: The reason I ask is this form is given to people, you state, that are looking to leave of their own volition.

MR. SOLIMINO: Well, it was my understanding that most of them had to sign that.

MS. WEINER: Were you not given this form?

MR. SOLIMINO: No. Definitely not.

MR. GENTILE: He was given this form.

MS. BAISI: The reason why we give this to the employees who leave is because we have to check on their benefits to make sure we pay them on the payroll and this is for the record, not for the reasons he stated. I just want to clarify that.

MS. WEINER: We are finished discussing this form and you were not given this form?

MR. SOLIMINO: No.

MS. WEINER: Anything further you want to discuss?

MR. SOLIMINO: Henry, when I came down there on a Monday afternoon you called me down to the office and you told me that the Board was very, very good to me, they were giving me – first you said $11,000.00 as a supplement, then you raised it to $15,000.00 and you said – you're remarks were the Board will go along with me, is that true? Now you're offering me – my salary was $36,850.00. Seventy percent of this is $25,795.00, but why do you keep saying, "I'm giving you seventy percent," when you're deducting my pension from that amount? Are you allowed to do that, deduct my pension?

MR. DREWITZ: Sure.

MR. SOLIMINO: Is it seventy percent then?

MR. DREWITZ: You're getting seventy percent of your actual salary. You're getting that between salary and supplemental benefits.

MR. SOLIMINO: Why do you say you're giving me seventy percent?

MR. DREWITZ: Because they don't have to give you anything.

MR. SIEGEL: I think you are getting that because you do not have to go on retirement prior to age 65 and get that deduction. If you had gone out before 65 and this wasn't given as a bridge-over –

MR. SOLIMINO: I was still taking a short ride on the pension.

MR. SIEGEL: Not if you took this and were given retirement at 65.

MR. SOLIMINO: I was still getting less on my pension.

MR. SIEGEL: The difference was being made up. They didn't have to give you anything. They were offering to bring you across –

MR. SOLIMINO: Because they didn't want me to have trouble here. That's why he was offering me this.

Do you have a copy?

MS. WEINER: I do not know that I have that copy. I will make a copy of it.

MR. GENTILE: Isn't it true he would then qualify for a smaller pension if he elected at that time rather than 65 or 70?

MR. DREWITZ: Sure.

MS. WEINER: This is Exhibit C-4.

MR. SOLIMINO: May I direct more questions to Mr. Henry Drewitz?

MS. WEINER: Yes.

MR. SOLIMINO: Henry, did the Board know about my retirement?

MR. DREWITZ: Of course they did.

MR. SOLIMINO: If they knew about it, why did you refuse me three times in one day to have a hearing before the Board? I wanted to speak to the Board and you screamed at me.

MR. DREWITZ: I didn't scream at you.

MS. WEINER: Finish your question and Mr. Drewitz will answer. If you wish to have him answer each question, then give him the time to answer.

MR. SOLIMINO: May I ask another question?

MR. GENTILE: Ask that question first.

MR. SOLIMINO: Why did you refuse me?

MR. DREWITZ: Board meetings don't run that way and I didn't scream at you.

MR. SOLIMINO: You most certainly did.

Did Sidney Krout know about my retirement?

MR. DREWITZ: There was a Board meeting discussing everything. Everybody knew about it.

MR. SOLIMINO: On March 8th it happened Sidney Krout went to the Woodside office. He saw my office was dark, no lights in it. It was empty. He started screaming where the heck was Solimino.

MR. DREWITZ: He doesn't scream either.

MS. WEINER: Go ahead.

MR. SOLIMINO: Why did he go around asking all the girls where is Solimino and why in God's name after Kathy Miller went up and told him I had to take an early retirement did he say, "Who the hell can retire from Astoria Federal and take an early retirement from Astoria Federal?" Your answer?

MR. DREWITZ: First of all, I wasn't there. Secondly, I can't believe that to be a factual statement because he was part of the discussion at the meeting. He was present and he certainly knew everything about it.

MR. SOLIMINO: You're saying Mr. Krout was there at the meeting, right, when I was discussed?

MR. DREWITZ: I don't know that he missed any meetings.

MR. SOLIMINO: I was terminated on March 5th. March 8th would be a Monday and I got a phone call about Sidney Krout and I called him up on the 9th at his home and I asked him if he knew anything about my retirement and he said, "How can I help you? What do you want me to do?" I said, "I don't want you to do nothing." I said, "Do you know I was forced to retire?" He said, "No," and he was ready to hang up because he realized he said the wrong thing.

What do you have to say about that?

MR. DREWITZ: I wasn't privy to the conversation.

MR. SOLIMINO: How come he can make a statement like that?

MR. DREWITZ: I don't know that the statement was made.

MS. WEINER: Do you have anything more you wish to say?

MR. SOLIMINO: Henry again, do you recall a meeting that you and I had at which time I told you that Mr. Salz had no knowledge of the Mortgage Origination procedure?

MS. WEINER: Approximately when was that meeting?

MR. SOLIMINO: That was – Mr. Beiter should know because he's the one who set it up for me. He told me to talk to Mr. Drewitz.

MS. WEINER: How long before the resignation or early retirement?

MR. GENTILE: Severance is the best word.

MR. SOLIMINO: I would say about six months before. Approximately six months before. I told you Mr. Salz had no knowledge of Mortgage Origination procedures, nor had he any intention of learning.

What did you do about it?

MR. DREWITZ: First of all, he was rather well versed in mortgages.

MR. SOLIMINO: He was?

MR. DREWITZ: Absolutely.

MR. SOLIMINO: I worked with him and he didn't know anything about mortgages. He didn't even know how to take an appraisal over the phone.

Did you know that?

MR. SIEGEL: Is he asking a question or debating? Are you completed?

MR. SOLIMINO: Why don't you relax.

MR. SIEGEL: Why don't you be a little more polite, so that someone can answer your questions?

MS. WEINER: You have asked your question?

MR. SOLIMINO: Yes.

MR. DREWITZ: Taking an appraisal over the phone, that's no job. You can take anybody off the street and in ten minutes tell him what to do. Joe Salz was hired as a specialist by Citizen Savings and Loan, which was acquired by Astoria January 31st, 1979. He was very knowledgeable in real estate matters and he was hired by Citizen to help in the re-structuring and hopefully liquidating some of their problem loans, so he knew quite

a bit about real estate and he has been in court giving testimony on many real estate matters, so to imply he knows nothing about real estate is not factual.

MS. WEINER: We won't argue the answer.

Anything else?

MR. GENTILE: I have a question.

MS. WEINER: Go right ahead.

MR. GENTILE: In deciding to reduce the staff in the Mortgage Origination Department, did you consider Joe Salz and Roger Chin to remove them to a different department?

MR. DREWITZ: Joe Salz was transferred to the main office eventually. Roger Chin is staying where he is.

MR. GENTILE: They are junior in age to Mr. Solimino as is Mr. Beiter.

MR. DREWITZ: That's irrelevant though in this matter.

MR. GENTILE: No. It's relevant in this hearing.

MR. DREWITZ: I don't think so.

MS. WEINER: If you are knowledgeable of their ages, are they younger or older?

MR. DREWITZ: They're younger.

MR. SIEGEL: To clarify that, Mr. Beiter, since you worked with all of them, would you compare the various job duties of Mr. Chin and Mr. Solimino and their various responsibilities and how they were different or the same back at the time?

MR. BEITER: Mr. Chin operates on the floor as such, in the middle of all the work. He does the credits, mostly checking mortgages prior to being sent up to see that they're complete. He shares that responsibility with Mr. Solimino. On the whole

I would say Solimino accepts more telephone calls since he's more widely known and more people would call and ask for him. Mr. Chin's duties have no involvement with builders. Mr. Solimino's did. He served on the Loan Committee. Mr. Chin did not. Mr. Chin was operating more in the nuts and bolts of the daily work than Mr. Solimino.

MR. SIEGEL: Would you say Mr. Chin was a beginner and not in a Vice President's role?

MR. BEITER: Yes. He came to us four or five years ago from the Roosevelt Savings Bank. He's a good quiet worker. You give him a pile of work and that's what he does. He didn't have the same capacity. He did not have the supervisory authority Mr. Solimino had.

MR. SIEGEL: In sum, they were totally different jobs?

MR. BEITER: Their jobs overlapped. He was subordinate to Mr. Solimino. Therefore, he had more to do than he.

MR. SIEGEL: As to what Salz did visa vis what Solimino did or didn't do, were they different jobs?

MR. BEITER: Different jobs. Salz was more parallel with Chin. He was more or less what you call a work-out specialist. You take problem real estate and try to make something out of it. When he was given authority to boss the floor, so to speak, this would be to facilitate the proper flow of the paper work that comes through from the time of its inception until the time it goes up to legal, just to see that each girl was properly trained and she was doing what she was supposed to do when she did it. He did not serve as part of the Loan Committee. He was being taught the credit function. He also did not have the contacts that Mr. Solimino had. Therefore, he would not accept as many calls from the street.

MR. SIEGEL: Would Mr. Solimino have functioned well in place of Mr. Chin?

MR. BEITER: That's where he started, yes.

MR. SIEGEL: Could he have done those nuts and bolts things?

MR. BEITER: I don't understand.

MR. SIEGEL: Considering his delegation of authority and he shunted things off, etc., where was he in terms of productivity in his job?

MR. BEITER: The job function as such, it's hard to compare the two. The one did not work too many interruptions in his daily work flow. The other did. Productivity could be measured in answering 50 phone calls in a day or processing 20 folders. They were different to that extent. He ran into the outside public more often than Chin, although we were breaking Chin into that too.

MR. SIEGEL: As a beginner?

MR. BEITER: Yes. Gradually introduce him to the brokers and the lawyers, as such. It's just the way we're structured. We try to do this with all our people.

MR. SIEGEL: Were Vice Presidents needed for those beginners jobs?

MR. BEITER: No.

MR. SOLIMINO: Frank, who broke in Roger Chin?

MR. BEITER: You did.

MR. SOLIMINO: Did I do a good job?

MR. BEITER: Yes.

MR. SOLIMINO: If my work load was marginal to unsatisfactory, how could I teach somebody how to be a mortgage man?

MR. BEITER: It has nothing to do with your work load. You taught the man. The man is good. He does his job.

MR. SOLILMINO: But somebody had to teach him?

MR. BEITER: Yes. You did the job yourself before.

MR. SOLIMINO: You admit I did a good job?

MR. BEITER: Yes. I have no complaints about your job.

MR. SOLIMINO: How about when we were still at the main office, you made Roger Chin Office Manager?

MR. WEINER: How long ago is that?

MR. BEITER: About three, four years.

MR. SOLIMINO: Did he work out?

MR. BEITER: No.

MR. SOLIMINO: He was too weak?

MR. BEITER: Yes.

MR. SOLIMINO: How come everybody around you is so weak? Could it be it extends to you being weak?

MR. SIEGEL: Does Mary Klecar have a problem running the office?

MR. BEITER: None whatsoever.

MR. SOLIMINO: She has nothing to do.

MR. GENTILE: That is the answer.

MR. DREWITZ: It's not true.

MS. WEINER: You have submitted her functions in her job?

MR. SIEGEL: Yes.

MS. WEINER: I think that at this point we have heard from both sides. I think both parties have been satisfied as to input. I think then that we can draw the investigation conference to a closing.

Any objections?

MR. DREWITZ: I would like to say something as a broad overview.

MS. WEINER: Go ahead.

MR. DREWITZ: When I became President of the Association I had the previous title as Mortgage Officer and in my advancement to President it was up to me to select a man that should succeed me as the Mortgage Officer. There were three people in the office that could be considered; Number 1, Mr. Solimino, a fellow by the name of Robert Riespeck who was the former President's son, and Frank Beiter, and in my evaluation of the people I selected Frank Beiter as the Mortgage Officer. I felt he had more on the ball, even though he was in a different department, and what areas he might have been a little weak he certainly could make it up in short order, so I selected him as the Mortgage Officer. Angelo I know very well for years as a friend, a co-worker, but in my position you have to sometimes make decisions that are best for the institution and in many ways Angelo was what I consider a weak individual. He lacked the power to make decisions. As a matter of fact, going back some years ago, he had a secretary Clara Alberigio. He couldn't even control her. She used to set her own lunch hours. I told him many times to speak to her and he could never get her to conform to regular lunch hour standards and so on down the line. So he's a good Joe, put a very poor administrator. The question of age discrimination doesn't even enter the picture here, because we don't discriminate on age. I'd be against myself. We hired a woman here in the Mortgage Origination Department, a part-timer. She's 66. I mentioned before and I'll repeat it again, I have preference for the senior people. I think they're generally more reliable. They work better. We don't have an absentee problem. So it was strictly on performance and nothing else but.

MR. GENTILE: On what did you base your decision on Frank Beiter?

MR. DREWITZ: Based on performance I saw over a number of years.

MS. WEINER: That I think will be the end of this conference.

MR. GENTILE: Thank you very much.

(Whereupon, the Investigative Hearing was concluded.)

_____

ANGELO J. SOLIMINO

_____

HENRY DREWITZ

_____

FRANK M. BEITER

_____

ARNOLD K. GREENBERG

_____

RHODA BAISI

Subscribed and sworn to before me
this _____ day _____, 1982.

_____

NOTARY PUBLIC

CERTIFICATE

I, MARK OSIPOW,

a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That, the within is a true record of this Hearing.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this Hearing.

/s/Mark Osipow
NOTARY PUBLIC

EXHIBIT 6 - DETERMINATION AND ORDER AFTER INVESTIGATION DATED JANUARY 25, 1983

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

Complainant	:	
Angelo J. Solimino,	:	
vs.	:	Case No.
Astoria Federal Savings and Loan	:	1E-E-A-82-82993A
Respondents	:	

DETERMINATION AND ORDER AFTER INVESTIGATION

On March 18, 1982, Angelo J. Solimino filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of his age in violation of the Human Rights Law of the State of New York.

After investigation and following a review of related information and evidence with named parties, the Division of Human Rights has determined in the above-entitled complaint that there is no probable cause to believe that the respondent (s) engaged in or was (were) engaging in the unlawful discriminatory practice complained of.

This determination is based on the following:

The record considered as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports

respondent's position that complainant was terminated because the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's Mortgage Origination Department. There is no evidence in the file that complainant's age was a factor in his termination.

The complaint is, therefore, ordered dismissed and the file is closed.

"Any party to this proceeding may appeal this order to the State Human Rights Appeal Board by filing with the Board a written notice of appeal within fifteen (15) days after service of this order. The notice of appeal must be filed by mail or in person at the office of the State Human Rights Appeal Board, Room 3224, Two World Trade Center, New York, N.Y. 10047. DO NOT FILE THE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board."

Dated & Mailed: January 25, 1983

STATE DIVISON OF HUMAN RIGHTS

By _____
Dean MacPherson, Regional Director

TO: Mr. Angelo Solimino, Complainant
35 Ava Drive
Syosset, NY 11791

Astoria Federal Savings and Loan
37-14 30 Avenue
Long Island City, NY 11103
Att: Henry Drewitz, President

Joseph J. Gentile, Esq. - Attorney for Complainant
30-15 Thirtieth Avenue
Long Island City, NY 11102

Jackson, Lewis, Schnitzler & Krupman -
Law Firm for Respondent
261 Madison Avenue
New York, NY 10016
Att: Paul J. Siegel, Esq.

EXHIBIT 7 - NOTICE OF FILING APPEAL WITH STATE HUMAN RIGHTS APPEAL BOARD

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
TWO WORLD TRADE CENTER - 25th FLOOR
NEW YORK, N. Y. 10047

TELEPHONE
488-2038
AREA CODE 212

ACKNOWLEDGMENT OF APPEAL

CASE TITLE:

ANGELO J. SOLIMINO,

COMPLAINANT-APPELLANT

VS

ASTORIA FEDERAL SAVINGS AND LOAN

RESPONDENT

CASE NO. 1E-E-A-82-82993A

APPEAL NO. 8948

TO ALL PARTIES:

Please take notice that an appeal to the STATE HUMAN RIGHTS APPEAL BOARD was filed on the above-titled case on January 31, 1983. The Original or Certified Record of the above entitled appeal was requested on February 7, 1983. It was submitted on February 11, 1983 by the State Division of Human Rights, and is now available for public inspection at the Board's office.

Please note the Appeal Board has limited review powers and must determine the appeal solely on the basis of the record compiled by the Division.

A public hearing will be scheduled, unless appellant, within 10 days from the date shown below, submits the attached *Waiver of Hearing* indicating that oral argument is not requested. When a hearing is scheduled, appellant must appear or the appeal will be dismissed.

If appellant wishes to submit a brief, it must be served upon all other parties *within 20 days from the date shown below*. Any reply brief from the Respondent must be served upon other parties *no later than 35 days from the date shown below*. Five (5) copies of all such briefs must be filed with the Board accompanied by proof of service to all other parties.

IMPORTANT NOTE: It is imperative that Appellant keep the Board advised of any change of address; *failure to do so can lead to dismissal of this appeal on the basis of abandonment.*

STATE HUMAN RIGHTS APPEAL BOARD

By: /s/ Irma Vidal Santaella, Chairman

Irma Vidal Santaella, Chairman

May 3, 1983

DATED AND MAILED:
TO (See list attached)

ALWAYS REFER TO APPEAL NUMBER WHEN WRITING OR TELEPHONING

APPEAL NO. 8948

DISTRIBUTION SHEET

APPELLANT

Angelo J. Solimino
35 Ava Drive
Syosset, N.Y. 11791

Joseph J. Gentile, Esq.
30-15 30th Avenue
Long Island City, New York 11102

RESPONDENT

Astoria Federal Savings and Loan
37-16 30 Avenue
Long Island City, New York 11103
Att: Henry Drewitz, President

Jackson, Lewis, Schnitzler & Krupman
261 Madison Avenue
New York, N.Y. 10016
Att: Paul J. Siegel, Esq.

DOHR

Commissioner H. Carl McCall
State Division of Human Rights
2 World Trade Center 53rd Fl.
New York, N.Y. 10047

Ann T. Anderson, Esq.
General Counsel ATT:_____
State Division of Human Rights
2 World Trade Center 53rd Fl.

EXHIBIT 8 - ORDER OF STATE HUMAN RIGHTS APPEAL BOARD DATED MAY 30, 1984

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center -
New York, N.Y. 10047
Tel: 488-2038 (area code 212)

NOTICE OF ORDER

To: All Parties to this Proceeding – APPEAL No. 8948

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Please note:

> "A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982)."

Attachment:

Form B8

ORDER

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
----------X

ANGELO J. SOLIMINO,

COMPLAINANT-APPELLANT

vs.

ASTORIA FEDERAL SAVINGS AND LOAN,

RESPONDENT
----------X

Case No. 1E-E-A-82-82993A

APPEAL NO. 8948

HEARING SCHEDULED: December 21, 1983

PRESIDING: Honorable Tibby Blum

SUBMISSION ON THE RECORD:

Complainant-Appellant submits on the record

Respondent deemed submitted on the record

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *State Division of Human Rights* v. *Columbia University, et al*, 39 N.Y.2d 612 and *State Office of Drug Abuse* v. *State Human Rights Appeal Board*, 48 N.Y.2d 276, and

A majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or characterized by an abuse of discretion, it is

ORDERED that the Determination and Order of the State

Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

/s/ Thomas A. Conniff
Thomas A. Conniff
Acting Chairman

Dated & Mailed: May 30, 1984

To: (See list attached)

STATE HUMAN RIGHTS APPEAL BOARD

APPEAL NO. 8948

DISTRIBUTION SHEET

APPELLANT

Angelo J. Solimino
35 Ava Drive
Syosset, N.Y. 11791

Joseph J. Gentile, Esq.
30-15 30th. Avenue
Long Island City, New York 11102

RESPONDENT

Astoria Federal Savings and Loan
37-16 30 Avenue
Long Island City, New York 11103
Att: Henry Drewitz, President

Jackson, Lewis, Schnitzler & Krupman
261 Madison Avenue
New York, N.Y. 10016
Att: Paul J. Siegel, Esq.

State of New York
Department of Law
Two World Trade Center
New York, N. Y. 10047
Att: Ann Horowitz
Assistant Attorney General

DOHR

Commissioner H. Carl McCall
State Division of Human Rights
2 World Trade Center 53rd Fl.
New York, N.Y. 10047

Roberto Albertorio Esq.
General Counsel ATT:_____
State Division of Human Rights
2 World Trade Center 53rd Fl.
New York, N.Y. 10047

EXHIBIT 10 - ORDER OF DONTZIN, J. DATED MARCH 6, 1984 RE: SOLIMINO V. DREWITZ ET AL

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------X

ANGELO J. SOLIMINO,

Plaintiff,

-against-

HENRY DREWITZ, FRANK M. BEITER, ARNOLD K. GREENBERG, RHODA BAISI, JACKSON, LEWIS, SCHNITZLER & KRUPMAN PAUL J. SIEGEL, ANNABELLE WEINER and JEAN MacPHERSON,

Defendants.

INDEX NO. 22074/83

#121 of 10/24/83

----------X

MICHAEL DONTZIN, J.:

Companion motions numbered 121 and 185 on the calender of October 24, 1983 are consolidated for disposition.

This is an action for damages arising out of the termination of plaintiff's employment with Astoria Federal Savings and Loan Association ("Astoria Federal"). Named as defendants are four officers of Astoria Federal, counsel for Astoria Federal and two functionaries of the New York State Division of Human Rights.

By motion numbered 121 the Astoria Federal officers and counsel seek dismissal of the complaint for failure to state a cause of action and failure to exhaust administrative remedies. By motion numbered 185 plaintiff seeks to disqualify the law firm of Jackson, Lewis, Schnitzler & Krupman as counsel for the

defendant officers of Astoria Federal. Defendants cross-move for a stay of the disqualification motion pending determination of their motion to dismiss the complaint.

The complaint contains two causes of action. The first, some seventy five paragraphs long, asserts a long-standing scheme and conspiracy on the part of defendants Drewitz and Beiter, Astoria Federal's President and Chief Executive Officer and Vice President respectively, to terminate plaintiff's employment. It is alleged that the Astoria Federal defendants, together with counsel, conspired to procure plaintiff's unlawful, forced retirement; that false reports were prepared concerning plaintiff's lack of dedication and his choice of early retirement over a transfer to another position; and that false and perjurious testimony was given at a hearing conducted by the State Division of Human Rights with regard to an age discrimination complaint filed by plaintiff.

The second cause of action asserts that counsel for Astoria Federal libeled plaintiff in a position statement submitted to the State Division of Human Rights in response to the age discrimination complaint.

In support of the dismissal motion defendants maintain that the first cause of action asserts no cognizable theory of tort upon which recovery may be had. The second cause is challenged on the ground that the alleged libelous statements were made in the course of a quasi-judicial proceeding, were pertinent to the issues and, thus, absolutely privileged. It is alleged, further, that plaintiff has an appeal pending before the State Division of Human Rights and, only after exhaustion of that remedy, may judicial review be obtained.

Affording plaintiff's rather inartfully drawn complaint the benefit of every favorable intendment, the first cause of action appears to assert claims sounding in wrongful termination of employment, intentional infliction of emotional distress, prima facie tort, perjury and conspiracy. None of these claims, however, may withstand defendants' motion to dismiss.

It is settled law that a cause of action in tort will not lie for wrongful or abusive discharge of an employee at will (Murphy

v. American Home Products, 58 NY2d 293). Nor may the unavailability of such claim be circumvented by the assertion, upon the same set of facts, of causes for intentional infliction of emotional distress or prima facie tort (Murphy, supra at 303, 304). Although plaintiff maintains that he is not suing his former employer, Astoria Federal, and was never formally discharged, the substance of plaintiff's claim against the Astoria Federal defendants is the wrongful, malicious and unjustified termination of his employment via forced retirement. Clearly, plaintiff is engaging in semantics in an attempt to circumvent the rules laid down by the Court of Appeals in Murphy, *supra*.

Equally without merit is plaintiff's perjury claim. No cause of action exists for perjury committed in a prior proceeding unless the perjury is part of a fraudulent scheme greater in scope than the issues determined in the prior proceeding (Newin Corp., v. Hartford Accident and Indemnity Co., 37 NY2d 211). Here, the total objective of the alleged scheme was the unlawful termination of plaintiff's employment and this was the very issue submitted to the State Division of Human Rights for determination.

Similarly, the conspiracy claim may not be allowed. There is no substantive tort of conspiracy. Rather, allegations of conspiracy must refer to an actionable, underlying wrong and are permitted only to show that this wrong flowed from a common scheme or plan (Cunningham v. Hagedorn, 79 AD2d 702). Where, as here, the underlying conduct is not actionable, the charge of conspiracy must fall too.

The second cause of action for libel must also be dismissed. The alleged defamatory statements, contained in the position statement submitted to the State Division of Human Rights by counsel for Astoria Federal, concerned the quality of plaintiff's job performance and were clearly pertinent to the issues raised in the age discrimination proceeding. Proceedings conducted by the State Division of Human Rights are quasi judicial in nature (Rabinovic v. State of New York, 108 Misc 2d 664) and, thus, communications made in connection therewith are absolutely privileged and may not be subject to an action for libel or slander (Julius J. Studley Inc. v. Lefrak, 50 A.D.2d 162).

Inasmuch as the complaint must be dismissed on the merits, the Court need not address the issue raised by defendants concerning the exhaustion of administrative remedies.

The motion by defendants for dismissal of the complaint is granted. The motion for disqualification of counsel is denied as moot.

Settle order.

DATED: March 6, 1984

J.S.C.

FILED
APRIL 18 1984
COUNTY CLERK'S OFFICE
NEW YORK

EXHIBIT 12 - ORDER OF MYERS, J. DATED APRIL 12, 1984
RE: SOLIMINO v. DREWITZ ET AL

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I
----------X

ANGELO J. SOLIMINO,

Plaintiff,

-against-

Index No.
22074/83

HENRY DRESITZ, FRANK M. BEITER, ARNOLD K. GREENBERG, RHODA BAISI, JACKSON LEWIS, SCHNITZLER & KRUPMAN, PAUL J. SIEGEL, ANNABELLE WEINER and JEAN MacPHERSON,

#190 of
11/28/83

Defendants.
----------X

ALLEN MURRAY MYERS, J.:

Defendants Weiner and MacPherson move to dismiss the complaint upon the grounds of lack of subject matter jurisdiction CPLR 3211[a][2]; immunity from suit for quasi-judicial acts performed in the course of their official duties; and failure to state a cause of action (CPLR 3211[a][7]). Plaintiff cross-moves to disqualify the Attorney-General from representing Weiner and MacPherson.

Plaintiff Solimino is a former bank officer who was employed in the mortgage origination department of Astoria Federal Savings and Loan Association. The complaint alleges that four of Solimino's fellow bank officers (defendants Dresitz, Beiter, Greenberg, and Baisi) together with the bank's legal counsel (additional defendants) conspired to force Solimino to take early retirement; that Solimino filed an age discrimination complaint

against his employer with the Federal Equal Employment Opportunity Commission; that the complaint was transferred to the State Division of Human Rights "SDHR"); and that the Hearing Rights Specialist in charge of the investigation (defendant Weiner) and the Regional Director of SDHR (defendant MacPherson) conspired with the bank's counsel to dismiss Solimino's age discrimination complaint. Specifically, Solimino asserts that Weiner's investigative report was based upon erroneous information supplied by the bank's counsel; that on the date of the investigative hearing, defendant bank officers together with the bank's legal counsel collusively discussed and prepared their testimony, evidence and strategy with Weiner prior to plaintiff's arrival at the hearing in order to effectively preclude Solimino's right to a fair and impartial hearing; and that defendant MacPherson was closely allied with defendant Weiner in seeing to it that the bank would be successful in obtaining dismissal of plaintiff's age discrimination complaint.

On January 25, 1983, the SDHR dismissed Solimino's complaint, finding that there was no probable cause to believe that the bank had engaged in unlawful discrimination on the basis of age. Solimino then filed a notice of appeal dated January 28, 1983 to the State Human Rights Appeal Board ("SHRAB"). Later, Solimino commenced the instant action seeking compensatory and punitive damages.

Turning to the instant motion, it is well settled that officials acting in a quasi-judicial capacity may not be held liable for decisions involving acts relating to such functions (see, Rottkamp v. Young, 21 A.D. 2d 373 [2nd Dept. 1964], aff'd 15 N.Y. 2d 831). Moreover, it has been specifically held that a proceeding before the SDHR is quasi-judicial in nature (Rabinovich v. State of New York, 108 Misc. 2d 664 [Ct. Cl. 1981], order confirmed, 78 A.D. 2d 597 [1st Dept. 1968], mot. for lv. to app. denied, 52 N.Y. 2d 704). Consequently, defendants Weiner and MacPherson, as quasi-judicial officials, may not be held liable in a damages suit for the effects of their alleged oppressive official action.

The court further notes that judicial review of the SDHR proceeding as it relates to Solimino's claims against Weiner and

MacPherson is inappropriate, in view of Solimino's pending appeal before the SHRAB. Upon Solimono's exhaustion of his administrative remedies, Solimino may commence a CPLR Article 78 proceeding to review the final determination of the SHRAB (Executive Law 298) and any allegations of the officers' bias (see, State Division of Human Rights v. Merchants Mutual Insurance Co., 59 A.D. 2d 1054 [4th Dept. 1977]; Klein v. O'Hagan, 51 N.Y. 2d 784, rev'g 70 A.D. 2d 514 [1st Dept. 1979]; See also, Matter of Wesser v. State of New York, 94 A.D. 2d 681, aff'd 60 N.Y. 2d 785).

Accordingly, the motion by defendants Weiner and MacPherson to dismiss the complaint for failure to state a cause of action against them is granted. Plaintiff's cross-motion to disqualify the Attorney-General from representing Weiner and MacPherson is denied as moot. Had the court reached the merits of the cross-motion, plaintiff clearly failed to demonstrate a conflict of interest which would warrant interference with movants' selection of counsel (see, Schmidt v. Magnetic Head Corporation, 97 A.D. 2d 151, 163 [2nd Dept. 1983]).

Settle Order.

Dated: APR 12, 1984

/s/A.M.M.
J.S.C.

EXHIBIT 14 - ORDER OF APPELLATE DIVISION, FIRST DEPARTMENT DATED MAY 7, 1985 RE: SOLIMINO v. DREWITZ, ET AL.

At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, on May 7, 1985

Present – Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Arnold L. Fein
Ernst H. Rosenberger, Justices.

----------X

Angelo J. Solimino,

Plaintiff-Appellant,

-against- : 23283-84

Henry Drewitz, Frank M. Beiter, Arnold K. Greenberg, Rhoda Baisi, Jackson, Lewis, Schnitzler & Krupman, Paul J. Siegel, Annabelle Weiner and Jean MacPherson,

Defendants-Respondents.

----------X

Appeals having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Michael Dontzin, J.), entered on April 16, 1984, which granted defendants Drewitz, Beiter, Greenberg, Baisi, Jackson, Lewis, Schnitzler & Krupman & Siegel motion to dismiss the complaint and denied plaintiff's motion to disqualify the attorneys Jackson, Lewis, Schnitzler & Krupman from representing the aforementioned defendants, and from an order of said court (Allen Myers, J.), entered on May 10, 1984, which granted

defendants Weiner and MacPherson's motion to dismiss the complaint and denied plaintiff's motion to disqualify the Attorney General from representing these two defendants,

And said appeals having been argued by Joseph J. Gentile of counsel for appellant, by Yolanda Pizarro of counsel for respondents Weiner and MacPherson, and by Anthony H. Atlas and Michael S. Cecere of counsel for respondents Drewitz, Beiter, Greenberg, Baisi, Jackson, Lewis, Schnitzler & Krupman and Siegel; and due deliberation having been had thereon,

It is unanimously ordered that the two orders so appealed from be and the same hereby are affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

AFFIDAVIT OF ANGELO J. SOLIMINO IN OPPOSITION TO MOTION DATED MARCH 11, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X	:	CV-85-0555
	:	(MAC)
ANGELO J. SOLIMINO,	:	
	:	AFFIDAVIT
Plaintiff,	:	OF PLAIN-
	:	TIFF
-against-	:	ANGELO J.
	:	SOLIMINO,
ASTORIA FEDERAL SAVINGS AND	:	IN OPPOSI-
LOAN ASSOCIATION,	:	TION TO
	:	MOTION
Defendant.	:	FOR SUM-
----------X		MARY
		JUDGMENT

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

ANGELO J. SOLIMINO, being duly sworn, deposes and says:

1. I am the Plaintiff herein, and make this affidavit in opposition to the Defendant's motion for summary judgment.

2. As the Court will note, both the *Moving Affidavit* and *Statement of Material Facts Not In Dispute* (annexed to the Notice of Motion) have been made and sworn to or signed by ANTHONY H. ATLAS, ESQ., an attorney for the Defendant, a person who obviously hasn't personal knowledge of the facts, who cannot set forth such facts as would be admissible in evidence and who cannot show affirmatively that he, the Affiant, is competent to testify as to the matters that are stated in his Moving Affidavit. It is clear that the Defendant has not followed the requirements of Rule 56(e) of the Federal Rules of Civil Practice, in submitting these improper supporting papers.

3. I have read and am familiar with the Deposition that was taken of me on December 1, 1988, the Moving Affidavit of ANTHONY H. ATLAS, ESQ., herein, the Defendant's alleged Statement of Material Facts Not In Dispute and the alleged Statement of Facts contained in the Defendant's Memorandum of Law in Support of this motion.

4. That as will hereinafter appear, the *actual date* of my meeting with President Henry Drewitz, when he first notified me that the Board of Directors was forcing me to retire, was *February 22nd, 1982*, and *not February 18th, 1982*, as is being claimed in the Moving Papers herein, and as will also hereinafter appear, *Henry Drewitz actually lied to me*, when he told me that it was a *Board decision that I had to retire*.

5. Because of Mr. Drewitz' lies about the Board of Directors' decision, and his *unauthorized notice* to me that I had to retire, I quit my office and job on *March 5th, 1982*, which was the last day of work that he allowed me, and thus, *because I was caused to leave my job under the pressure of his false representations, the facts show conclusively that I was actually constructively discharged on March 5th, 1982, and that this date must be considered as the last alleged discriminatory act that occurred with respect to the termination of my employment.*

6. There is absolutely no question but that I would have remained at my job, except for the *apparently official order* that I had to leave, and for the intolerable pressures that Henry Drewitz and his cohorts put upon me *in order to have me quit*.

7. When Henry Drewitz falsely notified me of the Board's alleged decision, which was purportedly made at the February 17th, 1982 meeting, *he was not authorized to do anything but to follow the Board's recommendations*, as were set forth in the Board's own minutes, as follows:

> "...Mr. Drewitz speak to Mr. Solimino, advise him of the changes to be made in the lending department and determine if he wishes to be transferred to another department or desires early retirement with the

> Association giving supplemental benefits up to his 65th birthday when social security benefits become available. The Directors, in authorizing these changes, gave Mr. Drewitz authority to work out a suitable compensation arrangement with Mr. Solimino if he decides to retire."

(excerpt of the Minutes of the Board of Directors Meeting held on February 17th, 1982, which minutes are annexed hereto as *Plaintiff's Exhibit A)*

8. During my aforesaid February 22nd, 1982 meeting with Henry Drewitz, after he falsely told me that it was a "Board Decision" that I was forced to take "early retirement" and then gave me a rundown of the supplemental benefits that he said the Board had authorized, I asked him repeatedly for permission to have a hearing before the Board, and he became very angry and flatly refused, and these facts came out during the Investigative Hearing that was held on November 29, 1982, at the Human Rights Division, as follows:

MR. SOLIMINO: Henry, did the Board know about my retirement?

MR. DREWITZ: Of course they did.

MR. SOLIMINO: If they knew about it, why did you refuse me three times in one day to have a hearing before the Board and you screamed at me.

MR. DREWITZ: I didn't scream at you.

(Defendant's Exhibit 5, Page 68, lines 12 through 19 inclusive)

9. I hereby submit that I was very uptight, tense and even sometimes confused during the taking of my said Deposition held on December 1, 1988, and I now understand that my interrogator, ANTHONY H. ATLAS, ESQ., was doing his best to stampede me into agreeing with his leading questions, solely in order to exploit my *honest mistake* in date that was made

in the charge that I filed with the Equal Employment Opportunity Commission (EEOC).

10. At the time I made my complaint at the Offices of EEOC, on *March 3rd, 1982*, two days before I was coerced into leaving my job, I was interviewed by Equal Opportunity Specialist, Joseph E. Christopher, regarding the facts of my claim of age discrimination, and because of the terrible state I was in, I was very happy that my good friend, Joseph J. Gentile, who is my attorney herein, had volunteered to go with me at the time, as this was a matter of first impression for us both.

11. At the time I made this complaint at the offices of EEOC, at 90 Church Street, New York, N.Y., I was a broken man, both mentally and physically, as I had hardly slept since I had first been told by President Henry Drewitz, that I was being forced to take "early retirement" at age 63, from a place where I had worked for over 36 years; I took this job when Astoria Federal Savings and Loan Association was a very small institution, shortly after I was discharged from the United States Army – I had been a prisoner of war in Germany for 27 months, ever since our tank-destroyer company had been captured in North Africa, – but I believe that this trauma of losing my lifetime employment with Astoria Federal was even harder to take than being captured and imprisoned in any enemy land.

12. That in response to Mr. Christopher's questioning, I inadvertently confused the date when I had the fateful meeting with Mr. Drewitz, and the date that I gave Mr. Christopher, as the date the most recent or continuing discrimination took place, that of *February 18th, 1982, was wrong*, and I made this *Mistake* because I didn't even stop to think that said meeting took place on the very *Monday* following the said Board of Directors meeting of February 17th, 1982, and this Monday's date was actually *February 22nd, 1982*.

13. When I later signed and swore to the truth of the typewritten charge, on March 10th, 1982, I again didn't stop to think about the actual date of the said meeting with Mr. Drewitz, which I knew took place on a *Monday*, as I was only concerned with following the instructions in Mr. Christopher's form

covering letter, which he had mailed to me, together with the typewritten charge on *March 4th, 1982*, the day after I visited his office at the EEOC, as aforesaid. A copy of the EEOC covering form letter, dated 3/4/82, which was sent to me by Mr. Christopher, together with the typewritten charge, is annexed hereto as *"Plaintiff's Exhibit B"*.

14. I only visited the EEOC offices once, on *March 3rd, 1982*, with Mr. Gentile, as aforesaid, and the typewritten charge was returned to the EEOC by mail, and thereafter presumably filed by EEOC on March 18th, 1982.

15. The moving papers herein contain *a weave of misleading statements and efforts* to try to deceive the reader (and Court) into believing that I, as the Plaintiff, must remain stringently bound to the *mistaken date* of February 18th, 1982, and during the taking of my said Deposition, Mr. Atlas did his best to make me adhere to that date, *by ignoring my mention of February 22nd, 1982*, at one point, when he asked the question and I answered, as follows:

> Q. Did Henry give you any reason why you were being terminated or why he was pushing you into early retirement?
>
> A. Yes. He told me the first day I went down, which was on February 22, 1982, he said that the association had lost about $2 million a year before. . ."

(from *Defendant's Exhibit* 3, page 112, lines 15 through 20)

and at the other point, when he asked the question and I answered, as follows:

> Q. I'm asking you about when you met with Henry on the 18th or 19th of February, whenever it was.
>
> A. 22nd.

(from *Defendant's Exhibit* 3, page 117, lines 14 through 16.)

16. As a matter of fact, further proof that I remembered that the day of our meeting was on the *Monday* (February 22nd,

1982), following the said Board of Directors meeting of February 17th, 1982, is found in *Defendant's Exhibit 5, herein*, which is the Transcript of the Investigative Hearing of 11/29/82, held at the Division of Human Rights, as follows:

> MR. SOLIMINO: Henry, when I came there on a Monday afternoon you called me down to the office and told me that the Board was very good to me....."

(from *Defendant's Exhibit* 5, page 66, lines 10 & 11)

17. One of the most important *Material Fact Issues* that remains *wide open*, and must be resolved in this action, is *the issue of whether I resigned from my job, voluntarily retired early from my job, was directly terminated from my job, or was constructively discharged from my job.*

18. The Defendant has never come to grips with this Issue, even though this Issue is of paramount importance, and Actually of the Essence in any employment discrimination suit, since it obviously makes a great deal of difference whether an employee quit of his own accord, retired, was fired or was forced out of his job because of unbearable treatment and conditions.

19. The Defendant and its attorneys have taken different positions and at different times, possibly because they have tried to tailor the facts to the situation at hand, as may be gathered from the following examples, in chronological order:

(a) On February 24th 1982, *Henry Drewitz* caused a Notice to All Employees to be posted, stating as follows:

> "Angelo J. Solimino, a vice president in the mortgage department at the Woodside Office of our Association *has taken early retirement* effective Friday, March 5, 1982.

(b) The minutes of the Board of Directors meeting of 3/17/82, contain this subtitle in capital letters:

ANGELO J. SOLIMINO ANNOUNCES RETIREMENT

(c) On September 30, 1982, *Paul J. Siegel, Esq.*, now a partner in Jackson, Lewis, Schnitzler & Krupman, the Defendant's attorneys, wrote a letter to the Human Rights Division, wherein he stated (about Solimino):

"He rejected both the opportunity to transfer and the early retirement bonus program offerd to him. He then *voluntarily resigned. Plaintiff's Exhibit C*

(d) On June 16, 1983, the same *Paul J. Siegel, Esq.* in a Letter-Brief written to the Human Rights Appeal Board, stated:

(Solimino) failed to present evidence to rebut Astoria Federal's showing of legitimate business reasons for removing him from the Mortgage Origination Department and *terminating his employment. Plaintiff's Exhibit D*

(e) On March 11, 1985, *Michael J. Cecere, Esq.*, a partner in Jackson, Lewis, Schnitzler & Krupman *signed* the *Answer* to the Complaint herein, and set forth as the SEVENTH DEFENSE therein:

"20. Plaintiff *voluntarily terminated* his employment with Defendant.

(from Defendant's Exhibit 2 page 4)

(f) On February 10, 1988, *Anthony H. Atlas, Esq.* of Counsel to Jackson, Lewis, Schnitzler & Krupman swore to an Affidavit in Opposition to Plaintiff's Motion to Take the Deposition of Paul J. Siegel,

"Plaintiff, who was an officer of Defendant Astoria Federal, *was discharged from that employment on March 5th, 1982*"

(g) On February 10, 1988, the same *Paul J. Siegel, Esq.* swore to an Affidavit in Opposition to Plaintiff's Motion to Take the Deposition of Paul J. Siegel,

"Any and all knowledge and information which I have with respect *to the termination of the Plaintiff* herein were obtained by me by way of confidential communications to me. . ."

20. Thus it is obvious that a serious fact issue exists, not only between the pleadings, but also amongst the Defendant's Chief Executive Officer, Henry Drewitz, and the individual attorneys from Jackson, Lewis Schnitzler & Krupman; since the Answer has not been amended, the legal position of the Defendant is that I voluntarily terminated my employment, and the legal position of the Plaintiff, as set forth in my Complaint is: On March 5th, 1982, the Defendant wilfully terminated the plaintiff's employment because of his age."

21. On February 24th, 1982, on a Wednesday, Henry Drewitz asked me to come to his office, in order to discuss the supplemental benefits that I was to receive up to my 65th birthday, which were to amount to 70% of base 1982 salary, less the amount of the reduced pension monies II was to receive; this is what he said that had been authoized by the Board of Directors, and he had already mentioned this matter two days before, on February 22nd, 1982, when he first told me that the Board had ordered that I should take early retirement.

22. After I left Mr. Drewitz office, I happened to meet my wife's boss, Edward J. Price, Vice President in charge of Mortgage Servicing, and he took me aside, and with a very sad and pitying expression told me, "*Angelo, I really tried for you*; when I found out what was happening, I begged Henry to have you transferred to Mortgage Servicing, as my assistant, at least until you reached 65, but he wouldn't budge", in fact, I asked him at least 3 different times, but he put me off". – I feel sure that this is exactly the way he told me, or in words very close to these quoted.

23. Months later, when we had the Investgative Hearing, on November 29th, 1982, at the Human Rights Division offices in Queens, both Henry Drewitz and Rhoda Baisi tried to brazen out this pretext of an offer of a transfer, but when my attorney,

Joseph J. Gentile directly asked Henry Drewitz about it, it went as follows:

MR. GENTILE: He still has an option to transfer, Mr. Drewitz?

MR. DREWITZ: At this point, I would say no.

MR. SIEGEL: But at that point he did?

MS. WEINER: At the time that he spoke to Mr. Drewitz he had the option of transfer. . . ."

(*Defendant's Exhibit 5, lines 15 throught 21*)

24. It is obvious from the foregoing dislogue that Henry Drewitz *was retaliating* for my bringing on the age discrimination complaint; that Paul J. Siegel, Esq., *was trying to salvage* his client, Astoria Federal, *from any retaliation stigma*, and that Ms. Weiner, the supposedly impartial investigator, *was also helping the employer's representatives sustain their story of the alleged offer of a transfer*, (that is why she was also made a party defendant in the New York Supreme Court action, the Complaint of which is set forth as *Defendant's Exhibit 9*, which fully describes what went on in the so-called Human Rights proceedings, and shows that ANNABELLE WEINER'S behavior throughout her so-called "investigation" was undoubtedly given over to the employer's representatives). It should be obvious that Ms. Weiner did not become alerted in any was to the unequivocal retaliatory statement made by President Henry Drewitz, in the conversation she had just taken part in,

25. Another incident that happened during the Investigative Hearing *that demonstrated retaliatory conduct* on the part of Henry Dewitz, representing my employer, was where the Human Rights hearing investigator, Ms. Weiner, *was actually doing the questioning but still did not recognize the retaliatory conduct that was being perpetrated as a response to her questions, was as follows:*

MS. WEINER: ". . .Just before a statement was made if he were not offered a position or a transfer and if he were offered one now he would accept it and the remark was made at this time he would not be offered another position.

Could I ask if the reason for that statement is because he has filed a complaint with the Division of Human Rights or what would be the reason? If there was a misunderstanding at that time and it is clarified at this time, why would a position not be offered at this time?

MR. DREWITZ: Number 1, with the hold we have on personnel we have no department openings at the present time. Rhoda knows we have an absolute freeze on personnel with the exception of Tellers, maybe a Clerk/Typist, that's about the only thing, but any executive staff, we're not taking on anybody in any kind of executive position and frankly I'm not very pleased about this whole mishmash."

(*Defendant's Exhibit 5, page 35, lines 24, 25 and page 36, lines 2 through 20*)

26. The Defendant's *only affiant* herein, ANTHONY H. ATLAS, ESQ., alleges that at the said Investgative Hearing of November 29, 1982, "...the Plaintiff had a full and fair opportunity to litigate his claim of age discrimination..." (paragraph 9 of his Affidavit), and claims that "The undisputed material facts also show that Plaintiff's claims are procedurally precluded. The Division was acting in a judicial capacity with respect to Plaintiff's claims." (paragraph 18 of his Affidavit). It is

extremely convenient for the Plaintiff's case that the Defendant saw fit to supply the entire transcript of that Investigative Hearing. (Defendant's Exhibit 5) so that this Court can determine for itself *whether the Division was acting in a judicial capacity*.

27. A reading of the transcript of said Hearing (*Defendant's Exhibit 5*) will disclose that *it was not conducted by an administrative Judge of any kind*, and that the *Human Rights Investigator* who presided over that Hearing:

(a) actively participated in giving testimony;

(b) made conclusory statements throughout;

(c) permitted Paul J. Siegel, Esq., the Respondent's attorney to testify at length and ad nauseam, in place and stead of the Defendant's witnesses;

(d) in accepting Vice President Arnold Greenberg's testimony as an expert witness in the matter of the running and efficiency of the Mortgage Origination Department, when he admittedly knew nothing about mortgage origination (*Defendant's* Exhibit 5, page 45, lines 24, 25, page 46, lines 2 *through* 7, *page 61, lines 22 through 24*)

(e) completely overlooked flagrant evidence of retaliation in many instances, as hereinbefore set forth;

(f) participated in making a decision finding that the Plaintiff *was terminated* for business related reasons, although the Defendant's position letter written by Paul J. Siegel, Esq., dated 9/30/82, and sent as a pleading to the Human Rights Division, maintained that (Solimino "voluntarily resigned", and throughout the Hearing itself, the Respondent-Employer's witnesses would not be pinned down to the said position that *Solimino was terminated*.

28. Annabelle Weiner, the so-called Human Rights Specialist, who was permitted to conduct both the investigation and the Hearing, was also the person who prepared an "Investigation

Report dated October 5, 1982, that completely summarized the conclusions set out in the "position letter" of Paul J. Siegel (*Plaintiff's Exhibit C*) and accepted them as *factual findings; she had only received said "position letter" the day before*, on October 4th, 1982, and her so-called "Investigation Report" concludes that (Solimino) resigned of his own volition", and that his "work productivity and supervisory effectiveness was considered to be marginal or unsatisfactory dating back to 1975". She finally concluded that "Complainant's position was eliminated for sound and lawful businesss reasons.", *all just as neatly written for her by Paul J. Siegel, Esq.*, in the "position letter".

(*A copy of this Investigation Report made by Annabelle Weiner is annexed hereto as Plaintiff's Exhibit E*)

29. After the Plaintiff received the unfavorable determination of the Human Rights Division, dated January 25th, 1983, set forth as *Defendant's Exhibit 6*, herein, the Plaintiff appealed that determination to the New York Human Rights Appeal Board, by filing a Notice of Appeal and a letter from Joseph J. Gentile, plaintiff's attorney, which protested the determination and gave our reasons therefore. A copy of my Notice of Appeal is annexed as *Plaintiff's Exhibit F*, and a copy of Mr. Gentile's letter is annexed as *Plaintiff's Exhibit G*.

30. After filing the Notice of Appeal, both parties herein received an Acknowledgement of Appeal from the State Human Rights Appeal Board, dated May 3, 1983, which stated in the 4th paragraph:

> "If appellant wishes to submit a brief, it must be served upon all other parties *within 20 days from THE DATE SHOWN BELOW*. Any reply brief from the Respondent must be served upon other parties *no later than 35 days from the date shown below*.

(*excerpt from Defendant's Exhibit 7*)

31. The Plaintiff filed his appeal brief within the time allotted to us, but Paul J. Siegel, Esq., called my attorney, Mr. Gentile, and requested an extension of time, which was refused, especially because the law appeared to be that even the Appeal Board could

not enlarge the parties' time for either filing an appeal brief or the reply brief, however, Paul J. Siegel, acting for the Defendant, evidently called up Rena Riback, Esq., Counsel to the Human Rights Appeal Board, and received a 20-day extension of time, until June 20, 1983. A copy of Paul J. Siegel's letter to Rena Riback, Counsel to the Human Rights Appeal Board, is annexed hereto as *Plaintiff's Exhibit H*.

32. When my attorney, Joseph J. Gentile received a copy of Mr. Siegel's letter to the Appeal Board, showing that an improper extension had been granted, he sent a letter, dated June 8th, 1983 by certified mail to the Human Rights Appeal Board, protesting the illegal extension and pointing out that the Rules of Practice were *mandatory* in stating that the appeal brief had to be filed within 20 days and the reply brief had to be filed *no later* than 35 days from the date of the Acknowledgement of Appeal Notice, but this protest was disregarded and the Respondent's very late reply brief was accepted. A copy of Mr. Gentile's said letter protesting the illegal extension of time is annexed hereto as *Plaintiff's Exhibit I*.

33. I respectfully submit to this Court that the *decision making process* that took place at the administrative levels in my age discrimination case presents a very valid argument *as to why a Federal Court should not give any preclusive effect to any administrative determinations made in a matter*, especially because of the complete lack of judicial training of the "investigators" such as Annabelle Weiner, who might be equated to a "rent control" clerk in civil service ratings, and because of the improper way that both the Investigative Hearing and the Human Rights Appeal were handled.

34. The Defendant's position that the Plaintiff should have first further appealed to the Appellate Division is not well taken, because an examination of the Appeal Board's Order, confirming the determination of the Human Rights Division, *Defendant's Exhibit 8*, herein will show that on page 3 thereof, there is a cautionary note to anyone that is aggrieved by said Order, as follows:

> "A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982)."

35. The action that I brought in New York County, which is described in the *Complaint* set forth as *Defendant's Exhibit 9*, was brought while the Appeal Board appeal was still pending, and was not brought against Astoria Federal Savings, the Defendant herein, who was my employer, and that case should not be construed as any sort of appeal to the New York State Courts involving the Division of Human Rights determination that was made against me.

36. I have submitted herewith supporting affidavits made by my wife, RITA SOLIMINO, who is a former employee of the Defendant Astoria Federal Savings, and from former Astoria Federal employees CATHERINE C. MINCONE, formerly Catherine C. Miller (and referred to as "KATHY MILLER" in the Investigative Hearing) and JEANNETT SILVERS, both of whom worked in the Mortgage Origination Department, and both of whom offer testimony that shows that the Defendant's witness and Paul J. Siegel, Esq., did not testify truthfully either in their writings or during the Investgative Hearing when they downgraded my abilities in my position and job.

37. My wife's affidavit clearly shows that my fateful meeting with President Henry Drewitz was on *February 22nd, 1982, a Monday*, just as I remembered during my Deposition, and that *my mistake* was made at the EEOC, and as I have stated herein, I was a very broken man and just didn't think at the time. My wife's affidavit also substantiates the fact that I was never offered a transfer by my employer or its representatives in management, and that the kindly efforts made by Edward J. Price, Vice President of Mortgage Servicing, were flatly turned down by Henry Drewitz, the President of the Defendant.

38. The affidavits of former employees CATHERINE C. MINCONE and JEANNETT SILVERS, clearly show that I was an able Vice President in the Mortgage Origination Department

and a capable employee who carried on much more than his share of the work, and had no problems in supervising personnel; their affidavits also show that I trained a lot of people to do the work in our department, and that I and my secretary did all of the building loan mortgages by ourselves.

39. The true facts are that I trained ROGER CHIN and KATHY MILLER to do mortgage origination work, that I helped train FRANK BEITER, when he became MORTGAGE OFFICER, that I helped train the said JEANNETT SILVERS to do our work, *but the record does not show* that I helped train ROBERT RIESBECK, the son of the late President, Edward Riesbeck, to do both mortgage origination work and savings department managerial work, that I also taught JOHN MASTRODOMENICO, to take over as Branch Manager at the Ditmars Savings branch where I was the first manager, that I was teaching JOSEPH SALZ to do mortgage origination work, until I was terminated, *and that I even* taught Henry Drewitz how to handle the Savings Department at the Main Office, when I first came into Mortgage Origination, and he was ordered to take over the Savings Department.

40. It is respectfully prayed that the Defendant's motion herein be denied in all respects, and that the Court will give me the fullest consideration in this matter.

ANGELO J. SOLIMINO

Sworn to before me this
11th day of March, 1989

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:

EXHIBIT C - POSITION STATEMENT OF ASTORIA DATED SEPTEMBER 30, 1982

ATLANTA
BALTIMORE
LOS ANGELES
SAN FRANCISCO
ST. LOUIS
WASHINGTON, D.C.
WHITE PLAINS, N.Y.

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
251 MADISON AVENUE • NEW YORK, N.Y. 10016
(212) 697-8200

PRACTICE LIMITED TO LABOR AND
EMPLOYMENT LAW ON BEHALF OF MANAGEMENT

September 30, 1982

Ms. Annabelle Weiner
Human Rights Specialist I
State of New York
Executive Department
Division of Human Rights
89-02 Sutphin Boulevard
Jamaica, New York 11435

Re: Angelo J. Solimino v. Astoria Federal Savings & Loan Assn., 1E-A-82-82993A

Dear Ms. Weiner:

Responding further to the Division's August 13, 1982 request for the Association's position in the above-referenced matter, we provide the following in the order stated in your letter. This response is based solely upon the Association's initial investigation, and is subject to being further clarified or supplemented.

1. In response to the specific allegations contained in Angelo Solimino's complaint of age discrimination, the Association states as follows:

> *First Paragraph:* Solimino was not denied any benefits, compensation or other term or condition of employment because of his age. Instead, due to the low volume of work performed by the Association's Mortgage Department, Solimino was offered the choice of transfer to another position in the Association, without

loss of seniority, or early retirement. He rejected both the opportunity to transfer and the early retirement bonus program offered to him. He then voluntarily resigned.

Second Paragraph: It is true that "the mortgage industry is very slow and that two Vice Presidents were no longer needed" in that Department. However, Solimino fails to state that his work productivity and supervisory effectiveness has been repeatedly rated as marginal or unsatisfactory.

Third Paragraph: Solimino was, indeed, the Association's oldest officer. However, his age was not considered in the Association's decision to reorganize the Mortgage Department. The actual duties performed by Solimino were minimal and are now performed by other mortgage Department officials and clerical personnel.

2. Mr. Solimino's position was eliminated for business-related reasons. As reflected in the enclosed minutes of Astoria Federal Savings' Board of Directors, Respondent decided to reorganize its Mortgage Department in order to expedite appraisal and commitment procedures through more effective supervision. (*See* Respondent's Exhibit A.) In addition, a reduction-in-staff was deemed to be necessary because the volume of mortgage lending was very low and the prospects for rapid recovery were slight. Thus, there was no need to maintain four mortgage lending officers and certainly no business justification for two vice presidents in this small department. Consequently, in light of Mr. Solimino's documented poor performance as a supervisor, it was determined that his position would be eliminated. (See comments on his 1975, 1976, 1977, 1978, 1979, 1980 and 1981 Employee Performance Evaluation firms, attached as Respondent's Exhibits B, C, D, E, F, G and H, respectively.)

Once the business-related decision was made to eliminate Mr. Solimino's position, he was offered the opportunity to bid for any vacant position for which he was qualified. Such a transfer would have been without prejudice to his accrued seniority or benefits. Nonetheless, he refused.

He was also offered the option of early retirement, which would have been supplemented by additional benefits. He initially accepted this offer, but then inexplicably decided to reject it.

3. To date, statements have not been obtained from witnesses. However, the Association is prepared to attend a fact-finding conference and substantiate the reasons for its decision to reorganize the Mortgage Department.

4 and 5. Between 1980 and 1982, the Association terminated thirty-two (32) employees, of which only seven were over 40. (21.9 percent). Of these seven, two employees were bus drivers who were terminated when the Association eliminated its bus service. Thus, only five of the thirty (16.7 percent) employees actually discharged were over age 40.

The number of discharged persons who are between the ages of forty and seventy is far less than the overall percentage of older workers in Astoria Federal Savings' workforce. There are 161 employees over *age* 40 in the association's total workforce of 405 workers (39.8%).

In the Mortgage Department as reorganized, the average age of the nonclerical mortgage personnel is 45. The workers are:

Name	*Position*	*Age*
Frank Beiter	Vice President	52
Mary Klecar	Ass't Vice President	52
Roger Chin	Ass't Secretary	31

Prior to Ms. Klecar replacing Mr. Solimino and Mr. Salz's transfer to the Morgage Servicing Department, the average age in the department was 46. The difference is *de minimus* and certainly does not reflect a deliberate effort to terminate older workers.*

* Ms. Klecar also replaced Mr. Salz, Assistant Secretary, age 38, who was transferred to the Mortgage Servicing Department as part of the departmental reorganization.

Finally, contrary to Solimino's assertion, Astoria Federal Savings does not discriminate on the basis of age with regard to the employment of officers. In fact, the average age of Astoria Federal Savings officers is 47.25; five of the twelve are over 50 (41.7 percent) and ten of twelve are over age 40 (83.3 percent).

6. Mr. Solimino was replaced by Mary Klecar, a 52 year old woman who holds the title of Assistant Vice President. Ms.Klecar has regularly received outstanding performance ratings. Her administrative skills have enabled her to perform many administrative tasks in the Mortgage Department.

• • • •

The foregoing recitation of the facts relevant to this matter, and the comparative date provided, clearly rebut Mr. Solimino's complaint of age discrimination. Consequently, his meritless complaint should be dismissed.

Cordially,
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Paul J. Siegel

PJS/tmf

bcc: Henry Drewitz
Rhoda Baisi
Martin F. Payson, Esq.

EXHIBIT E - INVESTIGATION REPORT DATED OCTOBER 5, 1982 FROM DIVISION OF HUMAN RIGHTS

STATE OF NEW YORK
Executive Department
DIVISION OF HUMAN RIGHTS

INTER-OFFICE MEMORANDUM

To: Jean MacPherson, Regional Director — Office 1E-Queens

From: Annabelle Weiner, HR Specialist I — Date October 5, 1982

Subject: Angelo S. Solimino vs Astoria Federal Savings and Loan — Case No. 1E-E-A-82-82993A

INVESTIGATION REPORT (10/5/82) 060

This complaint was filed on August 4, 1982. The complainant alleges unlawful discrimination by the respondent based on age. Complainant is sixty-three (63) years of age.

The information contained herein was obtained through interview with Paul J. Siegel, Attorney for respondent on August 13, 1982; investigation inquiry; information dated August 18, 1982 and correspondence received from respondent dated September 30, 1982; and the documentation attached hereto.

Exhibit R-A - Reorganization of Mortgage Dept.
Exhibits R-B, C,D,E,F,G, and H - Employee Performance Evaluation forms for complainant 1975-1981.

Respondent denies discrimination against complainant in the terms, conditions and privileges of employment because of his age. Respondent claims the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's mortgage origination Department. Complainant was offered the choice to transfe- to another

position with respondent without loss of seniority or early retirement. Complainant declined both offers and resgined of his own volition.

Respondent determined two vice presidents were no longer needed in the Mortgage Origination Department as the Mortage industry is very slow.

Respondent submitted documentation to support the fact that complainant's work productivity and supervisory effectiveness was considered to be marginal or unsatisfactory dating back to 1975.

Respondent admits complainant was their oldest officer. However, denies complainant's age was not considered in respondent's decision to reorganize the department in which complainant was employed. Complainant's position was eliminated for sound and lawful business reasons.

Respondent states the individual who replaced complainant, Ms. Klecar, age fifty-two (52), also replaced another employee, Mr. Solz, age thirty-eight (38) who was transferred as part of the reorganization. Ms. Klecar has received outstanding performance ratings.

EXHIBIT F - NOTICE OF APPEAL TO STATE HUMAN RIGHTS APPEAL BOARD DATED JANUARY 28, 1983

NEW YORK STATE : EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

	:	Case No.
Complainant,	:	
ANGELO J. SOLIMINO,	:	1 E-E-A-82-82993A
	:	
-vs.-	:	NOTICE OF
	:	APPEAL
ASTORIA FEDERAL SAVINGS	:	
AND LOAN ASSOCIATION,	:	
	:	
Respondent.	:	

TO THE STATE HUMAN RIGHTS APPEAL BOARD:

PLEASE TAKE NOTICE that ANGELO J. SOLIMINO, the above named Complainant, hereby appeals on the law and the facts to the STATE HUMAN RIGHTS APPEAL BOARD, from the Determination and Order After Investigation made by the Division of Human Rights, Queens County Office, on the 25th day of January, 1983, wherein there was a finding made of "no probable cause to believe that the Respondent engaged in or was engaging in the unlawful discriminatory practice complained of" and from each and every part of said Determination, as well as from the whole thereof.

Dated: Long Island City, N.Y.
January 28th, 1983

I am the Complainant Herein
And Have Authorized This
NOTICE OF APPEAL

/s/ Angelo J. Solimino
Angelo J. Solimino

Yours, etc.
JOSEPH J. GENTILE
Attorney for Complainant
30-15 30th Avenue
Long Island City, N.Y. 11102
Tel. No. (212) 726-6262

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE TO BE TRIED DATED APRIL 21, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

	:	
ANGELO J. SOLIMINO,	:	CV-85-0555
	:	Judge Glasser
Plaintiff,	:	
	:	PLAINTIFF'S
-against-	:	STATEMENT OF
	:	MATERIAL
ASTORIA FEDERAL SAVINGS	:	FACTS AS TO
AND LOAN ASSOCIATION,	:	WHICH THERE
	:	EXISTS A
Defendant.	:	GENUINE ISSUE
	:	TO BE TRIED

Pursuant to Local Court Rule 3 (g), Plaintiff Angelo J. Solimino hereby submits, in Opposition to Defendant's Motion for Summary Judgment, this statement of material facts as to which the Plaintiff contends that there exists a genuine issue to be tried:

1. On *February 22nd, 1982, a Monday*, Plaintiff Angelo J. Solimino was called to the office of Henry Drewitz, President of Astoria Federal Savings, and was told by Mr. Drewitz that the Board of Directors had decided to terminate his employment and to offer him early retirement (Defendant's Exhibit 3, which consists of excerpts of Solimino's depo., at page 112, lines 19 & 20, and page 117, line 16).

- the Defendant contends in Paragraph "2" of the Defendant's Statement of Material Facts Not in Dispute, that this meeting took place on *February 18, 1982*.

2. On February 21st, 1985, Plaintiff Angelo J. Solimino filed a complaint in this Court, alleging that the Defendant had

violated the Age Discrimination in Employment Act, in terminating his employment; Plaintiff contends that this action was filed within three years of his alleged Notice of Termination, which took place on *February 22nd, 1982*, as aforesaid;

- the Defendant contends that this action was filed three days late, because of its position that the alleged notice was given on February 18, 1982.

3. Plaintiff Angelo J. Solimino contends that he was mistaken when he gave the Equal Employment Opportunity Commision the date of February 18, 1982 as the date when he was given the alleged Notice of Termination by President Henry Drewitz, and explains how it happened in his Affidavit in Opposition herein, sworn to on March 11th, 1989.

- the Defendant *has not rebutted* the Plaintiff's affidavit of these facts with *any statement or affidavit of President Henry Drewitz*, who was admittedly the only other person with direct knowledge of the date, time and place of the said meeting, which took place between himself and the Plaintiff, and it is clear that the Defendant's Attorneys are only relying upon the mistaken date that was given to the EEOC as aforesaid, and it is also clear that their authority for their paragraph "2" of their Statement of Material Facts Not in Dispute, given as "Solimino depo. at 111", is *not accurate*, as "Solimino depo. at 112", the next page of Defendant's Exhibit 3, shows that Mr. Atlas was unable to reap the benefits of his very contrived and suggestive questioning, since Solimino was able to correct the said date to the correct one of *February 22nd, 1982* on said page 112, lines 18 & 19, of "Solimino depo."

4. Although paragraph "3" of the Defendant's Statement of Material Facts Not in Dispute alleges that "At that meeting, Mr. Drewitz told Plaintiff that the Board of Directors had decided to terminate Plaintiff's employment and offer him early retirement. .", the Defendant Astoria Federal Savings *has presented many different versions of the Plaintiff's departure from his employment*, as is carefully outlined in paragraph "19" of the

Plaintiff's Affidavit in Opposition to the Motion for Summary Judgment herein, -everything from his having taken "early retirement" and having "voluntarily resigned", through Mr. Atlas' sworn statement that the Plaintiff "was discharged on March 5th, 1982". Since the facts show that *President Henry Drewitz did not have the authority from the Board of Directors to give the Plaintiff a notice of termination*, during their said meeting (Plaintiff's Exhibit A, herein), but that none-the-less, the Plaintiff was obliged to leave his employment on the *5th day of March, 1982, solely due to Mr. Drewitz' gross deception and wrongful insistence*, and it is Plaintiff's position that he was *constructively discharged*, as a result, and that therefore, the disputed date of when he received the alleged notice of termination from Mr. Drewitz, should be disregarded, in favor of the date of March 5th, 1982, as the date when his cause of action accrued, so that his filing of the complaint herein on February 21st, 1985, was timely, and well within the statutory three years that is mandated for a wilful discharge.

- the Defendant, Astoria Federal Savings, in its official Answer to the Complaint, still maintains that "Plaintiff voluntarily terminated his employment with Defendant", and this unamended Answer tends to bolster the Plaintiff's argument that he was actually constructively discharged on March 5th, 1982, the day that he felt obliged to leave his employment.

5. Paragraph "5" of the Defendant's Statement of Material Facts Not in Dispute alleges that on March 4th, 1982, when Rhoda Baisi asked Plaintiff to sign a letter concerning his supplemental pension benefits, Plaintiff knew his employment by Defendant had already been terminated; this statement should instead be changed to read "Plaintiff believed his employment by Defendant had already been terminated", *as Plaintiff did not know at the time* that *Henry Drewitz had lied to him about the Board of Directors' order*, concerning his future with Astoria Federal Savings (Plaintiff's Exhibit A, herein).

6. Paragraph "6" of the Defendant's Statement of Material Facts Not in Dispute, is erroneous, *in that March 18, 1982, is the date when the EEOC filed Plaintiff's charge;* the "Division" was not involved until much later.

7. Paragraph "8" of the Defendant's Statement of Material Facts Not in Dispute, quotes the mistaken date of February 18, 1982, from Plaintiff's said charge that was filed with EEOC, but this date is disputed herein, as the mistake is explained in the Plaintiff's Affidavit in Opposition to this motion.

8. The Defendant, Astoria Federal Savings, in its *position letters* to both the Human Rights Division (Plaintiff's Exhibit C, page 2) and to the H.. ıan Rights Appeal Board (Plaintiff's Exhibit D, page 3) stated that its reason for the termination of Angelo J. Solimino, the Complainant, was a "reduction in staff" and a "reorganization" of its Mortgage Origination Department. Plaintiff has instead, consistently complained that he was discriminated against because of his age, and that Astoria Federal's reasons of "reduction in force" and "structural reorganization" were only pretextual. In fact, during the "Investigative Hearing" held in the Human Rights Division on Novembeı 29, 1982 (the minutes of which are set forth as Defendant's Exhibit 5) the Plaintiff contested these claims, and a reading of said Hearing will show that these reasons of "reduction in staff" and "reorganization" were hollow, and without any real basis in fact. In a recent *United States Court of Appeal case, held in the Second Circuit, Montana* v. *First Federal Savings and Loan Association of Rochester,* 88-7068, cited in the *New York Law Journal of March 13, 1989,* on page 5, the Court held that the Plaintiff had established a prima facie case of age discrimination, and had set forth specific facts *raising a genuine issue as to whether the employer's reason for termination was pretextual.* The Court stated that in a reduction-in-force case, or a structural reorganization case, a discharged employee who seeks under the standard set forth in *McDonnell Douglas Corp.* v. *Green* 411 U.S.792, 36 L Ed 2d 668, 93 S Ct 1817 (1973) to establish a prima facie case, need not show that she was replaced by a younger, newly hired employee, - as the Court noted that in a prior case, *Hagelthorn* v. *Kennecott Corp.*,

710 F. 2d 76 (2nd Circuit, 1983), it had held that the *McDonnel Douglas* formula is not inflexible. Thus it is clear that Defendant Astoria Federal Savings' reasons for terminating the Plaintiff, - because of alleged "restructuring" of the mortgage origination department, and a reduction-in-force", served to create a genuine factual issue, as to whether those proffered reasons were pretextual. A copy of an excerpt of subdivision A 2, entitled "Pretext", from this recent (February 21, 1989) 2nd Circuit decision of *Montana* v. *First Federal Savings and Loan Association of Rochester,* is annexed hereto as *Plaintiff's Exhibit J,* in order to show the Court's reasoning as to the existence of this genuine issue of fact in age discrimination cases where the employer alleges that the plaintiff-employee was terminated only because of revamping changes that were necessitated by "business reasons".

9. The Defendant has put into evidence as its *Exhibit 5,* the complete transcript of the Investigative Hearing that was held in the Human Rights Division on November 29, 1982. This transcript is replete with Astoria Federal Savings' claims that the Plaintiff, Angelo J. Solimino, was incapable of supervising the personnel who were working in the Mortgage Origination Department, and that his "work productivity" (as is stated in Paul J. Siegel, Esqs., position letter to the Human Rights Division, set forth as *Plaintiff's Exhibit C,* on page 2), was "marginal or unsatisfactory". In its *Answer,* which is set forth as *Defendant's Exhibit 2,* in the Fourth Defense thereof, the Defendant alleges: "Each and every action of Defendent which is the subject of the complaint, was taken for legitimate, non-discriminatory business reasons only." There can be no doubt that this defense of "business reasons" was meant to cover the Defendant's alleged claims that the Plaintiff's work had deteriorated badly, after 36 years of service, and that his supervisory abilities were ineffective.

- the Plaintiff has rebutted these *factual issues* with his own affidavit and with affidavits from two former co-workers who are inarguably experts in mortgage origination work, Catherine C. Mincone and Jeannett Silvers, showing that these Defendant's

claims were completely pretextual; but none-the-less, the foregoing controversy over the Plaintiff's abilities clearly serves to show that these issues of "work productivity" and "supervisory effectiveness" are also material fact issues that should be resolved at a trial.

10. In the said Investigative Hearing transcript, the witnesses for the Defendant employer claimed that the Plaintiff was offered the opportunity of a transfer to another department, but that he refused same (*Defendant's Exhibit 5*, pages 32 through 35) and Paul J. Siegel, Esq.'s letters to both the Human Rights Division and the Human Rights Appeal Board (*Plaintiff's Exhibits C & D, on* page 2, of each), also state this offer of a transfer, and that the Plaintiff refused such offer, but the Plaintiff Solimino has denied that any such offer was actually made.

- the Plaintiff, in his own affidavit, and his wife, Rita Solimino, in her affidavit, have both shown that the only possible viable transfer that he might have had, to the Mortgage Servicing department, - which transfer was urged upon President Henry Drewitz, by Edward J. Price, the Vice-President in charge of Mortgage Servicing, *was refused* by Mr. Drewitz, thus showing that this question of whether or not a viable transfer was offered also remains open as a genuine factual issue to be tried. (It should be remarked that the Defendant has not rebutted the Plaintiff's said affidavits by any affidavits from Henry Drewitz and Edward J. Price).

Respectfully submitted,

/s/ Joseph J. Gentile
JOSEPH J. GENTILE
Attorney for Plaintiff
30-15 30th Avenue
P.O. Box 2175
Long Island City, N.Y. 11102
(718) 726-6262

Dated: Queens County, N.Y.
April 21st, 1989

EXHIBIT J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 91—August Term 1988
Argued: August 29, 1988 Decided: February 21, 1989
Docket No. 88-7068

ELEANOR H. MONTANA,

Plaintiff-Appellant,

—against—

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge,*
CARDAMONE and PRATT, *Circuit Judges.*

Appeal from summary judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, dismissing plaintiff-employee's claims of age and gender discrimination.

Affirmed on gender discrimination claim; reversed and remanded on age discrimination claim.

CHARLES D. MAURER, New York, NY, *for Plaintiff-Appellant.*

MICHAEL MORAVEC, Buffalo, NY (Phillips, Lytle, Hitchcock, Blaine & Huber, of Counsel), *for Defendant-Appellee.*

PRATT, *Circuit Judge:*

The district court granted summary judgment dismissing claims of Eleanor H. Montana that in discharging her First Federal Savings & Loan Association of Rochester (First Federal) discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (ADEA) and on the basis of gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Title VII). We affirm the dismissal of the sex discrimination claim, because plaintiff failed to establish even a prima facie case of sex discrimination. On the age discrimination claim we reverse and remand, because plaintiff's submissions both established a prima facie case and set forth specific facts raising a genuine issue as to whether the employer's proffered reason for termination was pretextual.

I. FACTS

Montana began her employment with Knickerbocker Federal Savings and Loan Association (Knickerbocker) in

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2. *Pretext*

First Federal's articulated "legitimate, nondiscriminatory reason", *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093, for discharging Montana was that it eliminated her position in restructuring and centralizing its personnel department at its corporate headquarters in Rochester. Montana sought to show that this avowed reason for her termination was pretextual, but the district court held that she failed to raise a triable issue of pretext. We disagree. We note initially that Montana was not required

to show that age was the only factor in First Federal's decision. *Hagelthorn v. Kennecott Corp.*, 710 F.2d at 82; *Geller v. Markham*, 635 F.2d at 1035. Nor was she required to show that First Federal's proffered reason was false, but only that its stated reason was not the only reason and that her age did make a difference. *Hagelthorn*, 710 F.2d at 82.

When viewed in the light most favoraable to her, Montana's evidence was sufficient to defeat summary judgment. First, at the time of her discharge, Montana was the oldest and highest paid nonclerical employee in First Federal's personnel department. Second, she was the only department head whose position was consolidated into the corporate headquarters at Rochester and whose staff continued without her. Third, she was not offered the opportunity to transfer to Rochester. Fourth, after her termination, her duties were not eliminated; instead the bulk of her duties were reassigned to a coworker, Rossi, who was thirty years younger. Even before assuming these added responsibilities, Rossi had worked overtime on a regular basis. By taking on Montana's responsibilities, Ms. Rossi's workload increased by 15-20 percent. Moreover, because these additional duties overburdened Rossi, many of her duties were subsequently distributed to another younger, newly hired personnel employee. Fifth, when First Federal took over the personnel functions of its wholly owned subsidiary, HWD, and created the position of compensation analyst, it failed even to consider Montana for that position although she was qualified for it. Finally, after Montana's discharge, purportedly as part of a reduction in force, First Federal increased the number of employees in its personnel department by three, adding the positions of compensation analyst, assistant compensation analyst, and pension administrator. Still, Montana was neither offered a position nor even considered for those positions.

When viewed together, these circumstances create a genuine factual issue as to whether First Federal's stated reason for terminating Montana – the centralization of its personnel department in Rochester and accompanying reduction in force – was pretextual and, thus, as to whether age was a factor in First Federal's decision to terminate Montana. Summary judgment was, therefore, inappropriate.

We further note that the district court seems to have attached undue significance to First Federal's claim that it merely exercised a good faith business judgment in terminating Montana. Certainly the court could not merely substitute its judgment for that of a business judgment, nor could it determine that First Federal should more properly have released another instead of Montana. *See Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (the ADEA "was not intended as a vehicle for judicial review of business decisions"); *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). But where, as here, the plaintiff claims not that her employer used poor business judgment in discharging her but that her employer used the structural reorganization as a cover for discriminatory action, a federal court, to ensure that the business decision was not discriminatory, is not forbidden to look behind the employer's claim that it merely exercised a business decision in good faith. As the seventh circuit noted in *Graefenhain* v. *Pabst Brewing Co.*, 827 F.2d 13, 21 n.8 (7th Cir. 1987):

MEMORANDUM AND ORDER OF GLASSER, U.S.D.J.
DATED MAY 31, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANGELO J. SOLIMINO,

Plaintiff,

-against-

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant.
----------X

85 Civ. 0555

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

In this action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, defendant moves pursuant to Fed. R. Civ. P. 56(b) for summary judgment on the grounds that (1) the action is time-barred, and (2) plaintiff is administratively estopped from proving his case. For the reasons stated below, the court grants defendant's motion on the latter ground.

FACTS

Plaintiff joined defendant Astoria Federal Savings & Loan as a teller in October 4, 1945. On March 5, 1982, he was terminated. By that time, he was 63 years old and had reached the position of Vice President of the Mortgage Origination Department.

Plaintiff filed a formal charge of age discrimination with the federal Equal Employment Opportunity Commission (EEOC)

and the New York State Division of Human Rights (DHR) on March 18, 1982. DHR held an investigative hearing on November 29, 1982. DHR dismissed the complaint on January 25, 1983, and the State Human Rights Appeal Board affirmed on May 30, 1984.

On July 29, 1983, prior to the Appeal Board's affirmance, plaintiff brought an action in New York State Supreme Court for New York County, naming as defendants several officers and employees of the defendant, the defendant's law firm, and two employees of the DHR. Justice Dontzin construed the complaint as alleging causes of action for wrongful termination of employment, prima facie tort, perjury and conspiracy, and dismissed the entire complaint as against the non-DHR defendants, pursuant to N.Y. Civ. Prac. L. & R. § 3211(a)(7), for failure to state a cause of action. *Solimino* v. *Drewitz*, No. 22074/83 (Sup.Ct.N.Y.Co. April 16, 1984). Subsequently, Justice Myers dismissed the complaint as against the DHR defendants pursuant to N.Y. Civ. Prac. L. & R. § 3211(a)(7) for failure to state a cause of action. *Solimino* v. *Drewitz*, No. 22074/83 (Sup.Ct.N.Y.Co. May 10, 1984). The Appellate Division affirmed both rulings. *Solimino* v. *Drewitz*, No. 23283-84 (1st Dep't May 7, 1985).

On February 21, 1985, plaintiff filed this action, alleging that defendant had begun to discriminate against him on the basis of age after he turned 56 by denying him salary increases and promotions and by promoting younger people over him, and that defendant had terminated him because of his age.

DISCUSSION

I. STATUTE OF LIMITATIONS

The ADEA's statute of limitations, 29 U.S.C. § 626(e)(1), incorporates by reference the statute of limitations contained in 29 U.S.C. § 255(a), which states in relevant part that an action is

> forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

For the purposes of this motion only, defendant concedes the applicability of the three-year limitations period based on a "willful violation" of the ADEA.

Plaintiff claims that his cause of action accrued on the date he was terminated, March 5, 1982, so that his filing of the complaint on February 21, 1985 was timely. However, the case law uniformly rejects this contention. Rather, plaintiff's cause of action accrued on the date he was notified of his impending termination. *Russo* v. *Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 42 (2d Cir. 1988); *Shockley* v. *Vermont State Colleges*, 793 F.2d 478, 481 (2d Cir. 1986); *Miller* v. *International Telephone & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985); *Pfister* v. *Allied Corp.*, 539 F. Supp. 224 (S.D.N.Y. 1982); *E.E.O.C.* v. *Kimberly-Clark Corp.*, 531 F. Supp. 58 N.D.Ga. 1981).[1]

The parties agree that plaintiff was notified of his impending termination in a meeting with defendant's president, Henry Drewitz, which occurred sometime soon after a meeting of defendant's board of directors held on Wednesday, February 17, 1982.[2]

However, a factual dispute exists over whether plaintiff's meeting with Drewitz occurred on the Thursday or Friday after the board meeting (February 18 or 19, 1982), in which case the action is time-barred, or on the following Monday (February 22, 1982), in which case the action is timely-filed.

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[1] The basis for the decisions cited on this point is to be found in two Supreme Court rulings: *Delaware State College* v. *Ricks*, 449 U.S. 250, 258-59 (1980) (limitations period in suit under § 1981 and Title VII ran from date tenure decision was made and plaintiff was notified) and *Chardon* v. *Fernandez*, 454 U.S. 6, 7 (1981) (per curiam) (limitations period in § 1983 suit ran from date plaintiffs received termination letters).

[2] The date of the board meeting is undisputed. The minutes of the board meeting, dated 2/17/82, are annexed as Exhibit A to Affidavit of Plaintiff Angelo J. Solimino, In Opposition to Motion for Summary Judgment.

Defendant relies principally upon the Charge of Discrimination form which plaintiff filed with the EEOC and the New York State Division of Human Rights on March 18, 1982 – no more than a month after the meeting with Drewitz. On that form, plaintiff put down February 18, 1982 as the "date most recent or continuing discrimination took place." Below that line of the form, in the narrative portion, plaintiff stated "I have been given a notice of termination on February 18, 1982[.]" The form was signed under penalty of perjury.

During the investigatory hearing before the State Division of Human Rights on November 29, 1982 – over nine months after the Drewitz meeting – Drewitz testified that the meeting occurred on February 19, 1982. Tr. 27-28. Solimino's testimony conflicted in several respects with Drewitz's, but did not contradict Drewitz's recollection regarding the date. *Id.*, 29-30. However, Solimino later referred to a meeting with Drewitz – apparently the same meeting – as having occurred on a Monday afternoon. Tr. 66.[3] The first Monday after the February 17, 1982 board meeting was February 22, 1982. If that date or any date thereafter were correct, the action would be timely-filed.

Unlike the foregoing evidence, the rest of plaintiff's evidence on the statute of limitations issue dates from a time after this suit was filed, so that plaintiff's statements may reflect an awareness that his entire lawsuit was in danger of being dismissed as untimely.

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[3] While Mr. Solimino's prior consistent statement might be inadmissible hearsay, the hearing transcript in which it appears was attached to *defendant's* moving papers, and defendant sought no evidentiary ruling on its admissibility. Consequently, it is not error for the court to consider it on motion for summary judgment. *In re Teltronics Services*, 762 F.2d 185, 192 (2d Cir. 1985) (party opposing summary judgment waived objections to affidavits not made on personal knowledge by not motioning the district court to strike them); *Walker* v. *Wayne County, Iowa*, 850 F.2d 433, 435 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 791 (1989) (same with respect to affidavits containing hearsay); *Williamson* v. *United States Department of Agriculture*, 815 F.2d 368, 383 (5th Cir. 1987) (same).

At his December 1, 1988 deposition in connection with this lawsuit, Solimino steadfastly maintained that the meeting with Drewitz occurred on Monday, February 22, 1982 (Solimino Dep. 112, 117), although he also affirmed that every statement made on his Charge of Discrimination form was correct. Solimino Dep. 85-86.[4]

Finally, in connection with this motion, plaintiff has submitted his own affidavit and that of his wife. The affidavits allege that the meeting with Drewitz occurred on Monday, February 22, 1982.

In considering this motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight* v. *U. S. Fire Insurance Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (citations omitted). Summary judgment is inappropriate where, as here, a factual dispute exists as to the accrual date of a cause of action, and resolution of that dispute will determine whether or not the action is time-barred. *Telectronics Proprietary, Ltd.* v. *Medtronic, Inc.*, 687 F. Supp. 832, 844 (S.D.N.Y. 1988). *See also Helm* v. *South African Airways*, No. 84 Civ. 5404 (S.D.N.Y. June 25, 1987) (1987 U.S. Dist. LEXIS 5671) (in action under ADEA, fact dispute over date action accrued precluded summary judgment on statute of limitations grounds); *Hawley* v. *L. B. Smith, Inc.*, No. 82 Civ. 6372-CSH (S.D.N.Y. Feb. 25, 1985) (LEXIS, Genfed library, Dist. file) (same); *United States* v. *Becker*, No. 86 Civ. 3946 (S.D.N.Y. April 4, 1989) (1989 U.S. Dist. LEXIS 3227) (fact dispute over date on which tax assessment was made precluded summary judgment on statute of limitations grounds).

Accordingly, this ground for defendant's motion is rejected.

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[4] The court rejects defendant's contention that plaintiff's deposition testimony at 117-18 is an admission that the February 18, 1982 notice of termination date on the Charge is correct. Clearly, plaintiff merely voiced approval of the *March* 18, 1982 date stamped on the face of the Charge, indicating when it was received.

II. ADMINISTRATIVE ESTOPPEL

Defendant argues that the unreviewed[5] decision of the New York State Division of Human Rights ("DHR") denying plaintiff's age discrimination claim has preclusive effect in this federal court action. Plaintiff disputes this, and argues alternatively that even if this were true, the DHR hearing did not meet constitutional standards of due process and therefore provides no basis for administrative estoppel.

The court agrees that the DHR hearing, although unreviewed by the state courts, has preclusive effect in this federal court action.

No Supreme Court or Second Circuit opinion deals with the question whether a state agency's unreviewed rejection of an age discrimination claim has preclusive effect in a subsequent federal court action brought under the ADEA. However, two Courts of Appeal have dealt expansively with the issue, reaching opposite conclusions. *Duggan* v. *Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) (unreviewed agency decision not preclusive); *Stillians* v. *State of Iowa*, 843 F.2d 276 (8th Cir. 1988) (unreviewed agency decision preclusive).[6]

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[5] The court does not view plaintiff's state court action as having sought or obtained judicial review of DHR's findings as to his age discrimination claim. *See* "FACTS," *supra*.

[6] Other opinions dealing with this issue do so only in *dicta*, or contribute little to the analyses contained in *Duggan* and *Stillians*. The Ninth Circuit found administrative estoppel unavailable on the facts of the case before it in *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282-84 (9th Cir. 1986), but apparently assumed, without analysis, that unreviewed state agency findings could be preclusive in a federal ADEA suit. The Eleventh Circuit found administrative estoppel unavailable on the facts of the case before it in *Delgado* v. *Lockheed Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987), but expressed the view in *dicta* that unreviewed state agency findings should *not* be entitled to preclusive effect in federal ADEA suits. *See also Frank* v. *Capital Cities Communications, Inc.*, 689 F. Supp. 334 (S.D.N.Y. 1988) (declining to reach issue where preclusion not available on the facts at bar). The court in *Ibrahim* v. *New York State Department of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988) adopted the Seventh Circuit's reasoning in *Duggan*, holding that unreviewed state agency findings are not preclusive in federal ADEA suits. Other decisions rendered prior to the Supreme Court's important decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986) need not be discussed.

The conflicting rulings in *Stillians* and *Duggan* reflect divergent interpretations of the Supreme Court's decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986). *Elliott* held that an unreviewed state agency determination was not binding on a federal court with respect to a Title VII claim, but was binding with respect to a claim under 42 U.S.C. § 1983.

As to the Title VII claim, the Court's holding turned on a Title VII provision, 42 U.S.C. § 2000e-5(b), requiring the EEOC to give "substantial weight" to prior state proceedings. The Court noted that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." *Id.*, 478 U.S. at 795 (citing *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 470 n.1 (1982)).[7] Because of the inconsistency between according state agency findings "substantial weight" and according them preclusive effect, the Court concluded that Congress did not intend for state agency findings to bind a federal court in a Title VII suit.

However, with respect to plaintiff's § 1983 claim, the Court reached the opposite conclusion because it found that — in contrast with Title VII — nothing in the language or legislative history of § 1983 "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797 (quoting *Allen* v. *McCurry*, 449 U.S. 90, 97 (1980)). Observing that it had already approved the concept of administrative estoppel in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), and that administrative estoppel served the same "unifying" function as the Constitution's Full Faith and Credit Clause, the Court held that, absent a showing of contrary Congressional intent, "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact before it which the parties have had adequate opportunity to litigate,' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Id.*, 478 U.S. at 799 (quoting *Utah Construction*, 384 U.S. at 422).

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[7] The Court also observed that it had already held in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) that a *federal* agency's rejection of an employment discrimination claim had no preclusive effect in a subsequent Title VII suit. *Id.*

Thus, *Elliott* teaches that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to "contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.

That is precisely the way the Eighth Circuit read *Elliott* in its *Stillians* opinion. *Stillians* expanded upon the concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident:

> When interpreting a statute we should not forget what existed before it was enacted. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 106 S. Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen* v. *Johnson*, 343 U.S. 779,p 783, 72 S. Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

Id., 843 F.2d at 280-81 (brackets and ellipses in the original).

Stillians cautioned that, in determining whether a "statutory purpose" to displace common-law rules of preclusion is "evident," courts must set aside their own legislative and policy preferences and look solely to Congressional intent:

> Thus, the most important lesson to be learned from *Elliott* is that when a federal statute does not specifically address a particular issue, in order to

> decide that issue we must ascertain Congressional intent. Title VII claims are not precluded [by unreviewed state agency findings] because the Court found evidence that Congress intended that result. Likewise, traditional rules of preclusion were left untouched by 42 U.S.C. § 1983 because that was the intent of Congress.
>
> Ascertaining Congressional intent is often a difficult endeavor. When a statute does not speak on an issue and the legislative history is silent, we are forced to decide between two conflicting results. Our decision should not be based on our opinion of what direction the statute should take. If the result intended by Congress seems inconsistent with the overall objectives of the statute, so be it. Only Congress legislates and only Congress can amend.

Id., 843 F.2d at 280.

The opinion in *Stillians* went on to hold, in essence, that the presumption favoring retention of common-law rules of preclusion had not been rebutted where the ADEA's language and legislative history gave no indication of Congress's intent regarding the preclusive effect of unreviewed state findings. In reaching that conclusion, the Eighth Circuit found the ADEA's lack of any provision like § 2000e-5(b) highly probative, although not dispositive:

> One of the major factors in the Supreme Court's reasoning in *Elliott* was [42] U.S.C. § 2000e-5(b) which provides, in part, that the EEOC must "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 106 S. Ct. at 3225. Because giving substantial weight is inconsistent with giving preclusive effect, the Court had some indication of Congressional intent to guide it.

> We believe that the absence of a similar provision from the ADEA goes far toward resolving the issue before us. While we may not wish to imply Congressional intent from the absence of a similar provision, the applicability of *Elliott* to the present case certainly is weakened by its absence. When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar.

Id., 843 F.2d at 281-82.

The court also reasoned that denying preclusive effect to state agency findings would reduce state agency proceedings to little more than a dress rehearsal for a subsequent federal suit under the ADEA:

> For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738 [requiring federal courts to give state court judgments the same preclusive effect they would have in state court], or filing suit anew in the federal district court. Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation.

Id., 843 F.2d at 282.

The Seventh Circuit, reaching the opposite conclusion in *Duggan*, construed the Supreme Court's decision in *Elliott* as

requiring it to "determine whether there are enough parallels between Title VII and the ADEA to justify" the inference that, in drafting the ADEA, Congress meant to reject administrative estoppel. *Id.*, 818 F.2d 1294. In comparing the two statutory schemes, the Seventh Circuit – quite unlike the Supreme Court in *Elliott* – decided to focus on their respective "deferral mechanisms," meaning the statutory provisions giving the appropriate state agency a "limited opportunity to consider [the claim] before the federal machinery can be set in motion." *Id.*, 818 F.2d at 1295.

First, the court noted that the deferral mechanisms of both Title VII and the ADEA support an inference that state agency findings are not entitled to deference. For example, both statutes permit state agency determinations to be superceded by federal agency action – after 60 days under Title VII, or by filing a claim directly with the EEOC under the ADEA. *Id.*, 818 F.2d at 1295-96 (citing Title VII, 42 U.S.C. § 2000e-5(c) and the ADEA, 29 U.S.C. § 633(b)). Under both statutes, concurrent or subsequent EEOC investigations would be rendered superfluous if the state agency findings had preclusive effect. Furthermore, the court found it "anomalous" to conclude that state agency findings should have preclusive effect when EEOC findings do not. *Id.*, 818 F.2d at 1295 (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973)).[8]

Second, the court found that, to the extent that the ADEA's deferral mechanisms differed from Title VII's, the differences indicate that, "if anything, less deference is due state proceedings

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[8] The Supreme Court made the same observation in *dicta* in *Kremer Construction Corp.*, 456 U.S. at 470 n.1, and this *dicta* became the basis of the Sixth Circuit opinion affirmed by the Supreme Court in *Elliott*. *See Elliott*, 478 U.S. at 793. However, as previously discussed, the Court's opinion in *Elliott* appeared to rely upon the inconsistency between the "substantial weight" standard of § 2000e-5(b) and the total preclusion available under common law. The Court did not reiterate or appear to rest its decision upon *Kremer*'s statement in *dicta* that Congress would not have afforded state agency proceedings preclusive effect while denying such effect to EEOC findings.

under the ADEA than under Title VII." *Id.*, 818 F.2d at 1296. Because the filing of a federal ADEA action stays any state proceedings, the ADEA — unlike Title VII — never affords the state agency a period of exclusive jurisdiction. *Id.*, 818 F.2d 1296 (citing 29 U.S.C. § 633(a)). Moreover, under the ADEA — unlike Title VII — the claimant can file charges with the EEOC and the state agency simultaneously. *Id.*, 818 F.2d at 1295-96 (citing 29 U.S.C. § 633(b)).

Third, the court addressed what it conceded to be the employer's "strongest argument": namely, that the Supreme Court in *Elliott* focused on Title VII's "substantial weight" provision, § 2000e-5(b), and not on the structure of Title VII's deferral mechanisms, in determining that Congress intended to displace the common law of preclusion in enacting the ADEA. The Seventh Circuit stated that § 2000e-5(b) "is simply the most obvious piece of evidence that administrative *res judicata* does not operate in a Title VII suit. Thus, it is not surprising that the Court in *Elliott* heavily relied on this provision. The absence of a comparable section in the ADEA is certainly not fatal to [plaintiff]." *Id.*, 818 F.2d at 1296.[9]

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[9] Relying on a footnote in *Kremer*, the Seventh Circuit noted that the legislative history of the 1972 amendments to Title VII indicates that Congress added the "substantial weight" provision of § 2000e-5(b) in order to *increase* the EEOC's deference to state agency findings, which the EEOC previously had been free to ignore. The court concluded that it would be "far-fetched" to construe the ADEA's *lack* of a provision *increasing* deference to state agency findings as indicating that Congress intended to give preclusive effect to such findings. *Id.*, 818 F.2d at 1297 (citing *Kremer*, 456 U.S. at 470 n.8).

It is true, as the Seventh Circuit observed, that in *Kremer*, the Supreme Court invoked this bit of legislative history to find that Title VII's "substantial weight" provision could not have implicitly repealed a federal statute (28 U.S.C. § 1738) granting state court judgments "full faith and credit" in federal court. However, in the same footnote, the Court found it "even more implausible" to find an implied repeal of § 1738 in Title VII's *deferral* provision, 42 U.S.C. § 20000e-5(c) — the very provision upon which the Seventh Circuit's analysis largely turns. *Kremer*, 456 U.S. at 470 n. 8.

(Footnote continued)

The Seventh Circuit's opinion depends upon its debatable assumption that the Supreme Court in *Elliott* became so thoroughly distracted by "the most obvious piece of evidence" — *i.e.*, the "substantial weight" provision contained in § 2000e-5(b) — that it failed to articulate the true basis of its decision — *i.e.*, the lack of deference implicit in the structure of Title VII's "deferral mechanisms." This court will not make that assumption. The Supreme Court is capable of articulating its reasoning and its reasoning in *Elliott* is clearly articulated.

Furthermore, the Seventh Circuit's opinion improperly conflates the issues of "deferral" and "preclusion." The Supreme Court has not been receptive to similar attempts to read more into the deferral provisions of Title VII and the ADEA than the structure and purpose of those provisions will support. *See Kremer*, 456 U.S. at 470 n.1 (it would be "implausible" to find that Title VII's deferral provision implicitly repealed the federal statute granting state court judgments preclusive effect in federal court when "that [deferral] provision does not even address the issue of the proper weight to be afforded state decisions"); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-57 (1979) (rejecting argument that differences between deferral provisions of Title VII and ADEA indicated that "the ADEA pays less deference to state agencies and that, as a consequence, ADEA claimants have the option to ignore state remedies").

Deferral and preclusion are not equivalent in effect or purpose. Deferral mechanisms simply give the state agency the "first crack" at the claim. Preclusion, in contrast, gives the state agency the "last word" on the claim in a limited class of cases (*i.e.*, those in which the state agency rules within 60 days, or rules after 60 days but before the claimant files a federal action. *See*

In short, *Kremer* features language inconsistent with the reasoning of *both* the Seventh and Eighth Circuits. Moreover, its reading of § 2000e-5(b) is manifestly inconsistent with *Elliott's* reading of the same provision. Since *Kremer* is not as recent as *Elliott*, and since *Kremer* involved the preclusive effect of a state *court* judgment under § 1738 rather than the preclusive effect of an unreviewed state agency finding under the federal common-law rules of preclusion applicable here, the court will be guided by *Kremer* only where it is consistent with *Elliott*. *See Elliott*, 478 U.S. at 794.

29 U.S.C. § 633(a) and (b)). Deferral "is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Evans*, 411 U.S. at 756. While preclusion, like deferral, helps conserve judicial resources, it "also serves the value of federalism," and, like the Constitution's Full Faith and Credit clause, "'act[s] as a nationally unifying force.'" *Elliott*, 478 U.S. at 798-99 (quoting *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 289 (1980) (White, J., concurring in judgment)). Thus, preclusion serves a more important value than deferral, and statutory deferral mechanisms are not an accurate indicator of Congressional intent to displace common-law rules of preclusion.

Rather than comparing the ADEA's deferral mechanisms to those in Title VII, the proper inquiry under *Elliot* is whether or not any provision of the ADEA evinces a Congressional intent to "contravene the common-law rules of preclusion[.]" *Elliott*, 478 U.S. at 797; *accord Stillians*, 843 F.2d at 281[10] More specifically, the approach taken by the Supreme Court in *Elliott* dictates that the court examine the ADEA to see whether it contains any provision – like the "substantial weight" provision of Title VII – which addresses the issue of the proper weight to be afforded state agency findings, and which accords such findings something less than preclusive effect.

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[10] The Eighth Circuit recognized this in *Stillians* when it rejected the Seventh Circuit's methodology of "reason[ing] by analogy" from the provisions of Title VII:

> Comparing the ADEA with Title VII and 42 U.S.C. § 1983 [as the Seventh Circuit did in *Duggan*] does not address the ultimate issue whether Congress intended to abrogate traditional rules of preclusion when it enacted the ADEA. Even if the ADEA more closely parallels Title VII and § 1983, if Congress did not intend to abrogate preclusion when it enacted the ADEA, then preclusion should still apply. We should not reason by analogy when interpreting statutes. The proper analysis is to examine the ADEA on its own rather than merely compare and contrast it with Title VII.

Id., 843 F.2d at 281 (footnote omitted).

The court finds no such provision in the ADEA. Moreover, had Congress wanted to demonstrate an intent to displace the common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII. As the Eighth Circuit stated in *Stillians*, "[o]nly Congress legislates and only Congress can amend." *Id.*, 843 F.2d at 280. This court would be implicitly amending the ADEA if it were to hold that the ADEA displaces common-law rules of preclusion. The court declines to do this. Rather, following *Elliott* and *Stillians*, it will adhere to the presumption that state findings – including unreviewed state agency findings – can have preclusive effect in an ADEA action in federal court.

This result does not denigrate the important right protected by the ADEA. The Supreme Court in *Elliott* found that unreviewed state agency findings have preclusive effect even in cases brought under 42 U.S.C. § 1983 to vindicate fundamental liberty and property rights guaranteed by the Constitution. There is no reason to suppose that a right created by statute should be accorded greater solicitude, absent a showing of a Congressional intent to the contrary.

The court also rejects plaintiff's argument that the hearing afforded him by the state agency failed to meet the requirements of constitutional due process.

The elements of administrative estoppel are:

1) the agency was acting in a judicial capacity;

2) the disputed issues of fact were properly before the agency and the parties were given an adequate opportunity to litigate them; and

3) the courts of that particular state would give the agency's factfinding determinations preclusive effect. *Elliott*, 478 U.S. at 797-98 (quoting *Utah Construction*, 384 U.S. at 422); *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987).

The agency obviously was acting in a judicial capacity, and the court's independent reading of the hearing transcript persuades it that the parties – each of whom were represented by counsel – had adequate opportunity to litigate the factual disputes resolved by the agency. Moreover, the Supreme Court has confirmed the constitutional adequacy of a virtually identical procedure used by the same New York agency to adjudicate employment discrimination charges. *Kremer*, 456 U.S. at 479-85; *accord Kirkland*, 828 F.2d at 107-09. Finally, the Second Circuit has held that New York state courts would give preclusive effect to a DHR hearing. *Kirkland*, *supra*. *See also Brugman* v. *City of New York*, 102 A.D.2d 413, 477 N.Y.S.2d 636 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 1011, 489 N.Y.S.2d 54, 478 N.E.2d 195 (1985). Thus, all the elements of administrative estoppel have been satisfied here.

Having determined that unreviewed state agency findings can have preclusive effect in a federal ADEA suit, and that the unreviewed state agency finding in this case is entitled to such deference, all that remains is to determine the effect of those findings on plaintiff's cause of action under the ADEA. The state agency found the following facts:

> The record considered as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports respondent's position that complainant was terminated because the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's Mortgage Origination Department. There is no evidence in the file that complainant's age was a factor in his termination.

Determination and Order After Investigation, annexed as Exhibit 6 to the Moving Affidavit of Anthony H. Atlas.

Since these findings bind this court, the plaintiff cannot prove his claim under the ADEA that his employer "discharge[d him]

or otherwise discriminate[d] against [him] with respect to his compensation, terms, conditions, or privileges of employment, because of [his] age[.]" 29 U.S.C. § 623 (a)(1).

Accordingly, defendant's motion for summary judgment is granted.

SO ORDERED,

/s/ I. Leo Glasser
United States District Judge

Dated: Brooklyn, New York
May 31st, 1989

JUDGMENT DATED JUNE 2, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

ANGELO J. SOLIMINO,

Plaintiff,

-against-

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant.
----------x

JUDGMENT

CV 85-0555 (ILG)

A memorandum and order of Honorable I. Leo Glasser, United States District Judge, having been filed on June 2, 1989 granting defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) on the ground that plaintiff is administratively estopped from proving his case, it is

ORDERED and ADJUDGED that plaintiff take nothing of defendant; and that defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) is granted on the ground that plaintiff is administratively estopped from proving his case.

Dated: Brooklyn, New York
June 2, 1989

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

EXCERPTS FROM NEW YORK HUMAN RIGHTS LAW

§ 297. **Procedure**

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The industrial commissioner or the attorney-general or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3. a. If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain

from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a consent decree embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b. If the respondent and the division agree upon conciliation terms the division shall serve upon the complainant a copy of the proposed conciliation agreement. If the complainant agrees to the terms of the agreement or fails to object to such terms within fifteen days after its service upon him, the division shall issue an order embodying such conciliation agreement. If the complainant objects to the agreement he shall serve a specification of his objections upon the division within such period. Unless such objections are met or withdrawn within ten days after service thereof, the division shall notice the complaint for hearing.

c. Notwithstanding any other provisions of this section, the division may, where it finds the terms of a conciliation agreement to be in the public interest, execute such agreement, and limit the hearing to the objections of the complainant. If, however, the divison finds that the complainant's objections to the proposed conciliation agreement are without substance or that noticing the complaint for hearing would be otherwise undesirable, the division may in its unreviewable discretion, at any time prior to a hearing before a hearing examiner dismiss the complaint on the grounds of administrative convenience.

d. If a conciliation agreement is entered into, the division shall serve a copy of the order embodying such agreement upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

4. a. Within two hundred seventy days after a complaint is filed, or withing one hundred twenty days after the board has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the dvision has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented soleiy by his attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound

by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

b. If the respondent fails to answer the complaint, the hearing examiner designated to conduct the hearing may enter the default and the hearing shall proceed on the evidence in support of the complaint. Such default may be set aside only for good cause shown upon equitable terms and conditions.

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint; (iii) awarding of compensatory damages to the person aggrieved by such practice; (iv) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (v) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such

respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

d. The division shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision three or paragraphs (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a

temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show case, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper. In the event that the complaint is dismissed by final order of the division or a court, the respondents shall be entitled to such remedies as are prescribed in section twenty-five hundred twelve of the civil practice law and rules.

7. Not later than one year from the date of a conciliation agreement or an order issued under this section, and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. Upon a finding of non-compliance, the division shall take appropriate action to assure compliance.

8. No officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a.

L.1951, c. 800; amended L.1952, c. 285, § 7; L.1960, c. 978; L.1961, c 414, § 5; L.1962, c. 164, § 2; L.1962, c. 310, § 134; L.1962, c. 369, § 3; L.1962, c. 529; L.1965, c. 4 § 2; L.1965, c. 851, § 4; L.1968, c. 10, § 2; L.1968, c.958, § 6; L.1969, c. 218; L.1969, c. 359, §§ 9, 10; L.1969, c. 1070, § 2; L.1970, c. 316; L.1974, c. 27, § 2; L.1974, c. 173,§§ 7-9; L.1977, c.729, §§ 1, 2.

§ 297. **Procedure (As Amended)**

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney-general, or the chairman of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

[See main volume for text of 2 and 3]

4. a. [Eff. until June 30, 1994.] (i) Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer

the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the commissioner of human rights shall establish a voluntary arbitration procedure in cooperation with the New York state human rights arbitration advisory committee. The commissioner shall promulgate rules and regulations to enable complainants and respondents to voluntarily submit disputes

to impartial arbitration. The division shall fully notify complainants and respondents eligible to elect arbitration of their rights and responsibilities, including limitations on their right of appeal. All information provided shall be in or be accompanied by an explanation in plain English or other languages as necessary. The arbitration program shall be administered by the American Arbitration Association and the arbitrator shall be selected from the panel of arbitrators established by such association. A submission to arbitration shall divest the commissioner of further jurisdiction over the matter and the determination of the arbitrator shall be final, subject only to review in accordance with article seventy-five of the civil practice law and rules. The cost of such arbitration shall not be borne by the division but shall be provided for by the rules and regulations of the commissioner. The commissioner is authorized to apply for and receive such grant monies as may be available to support the arbitration program.

[See main volume for text of b to d and 5]

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, of if the complaint alleges an unlawful discriminatory practice under subdivision two-a or paragraph (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, or, if no supreme court justice is available in such county, in any other county within the judicial district, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it

necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant apropriate injunctive relief upon such terms and conditions as it deems proper.

[See main volume for text of 7 to 9]

(As amended L.1982, c. 863, § 1; L.1984, c. 83 § 1; L.1984, c. 266, § 1; L.1989, c. 568, § 1.)

§ 297-a. State human rights appeal board

1. There is hereby created in the executive department a state human rights appeal board, in this article referred to as the board, consisting of a chairman and three members appointed by the governor, by and with the advice and consent of the senate. No more than two members shall be from the same political party.

2. The governor shall appoint a chairman, to serve as the chief executive officer of the board, and who shall hold office at the pleasure of the governor. The chairman of the board shall have the power and the duty to assign members appropriate functions as may be needed to promote the efficient transaction of the business of the board and to appoint such employees and agents as he may deem necessary, fix their compensation within the limitations provided by law and prescribe their duties.

3. The terms of office of the present members of the board shall expire on June thirtieth, nineteen hundred seventy-five. Thereafter, the term of a member shall be six years, provided, however, that of those members first appointed on or after the effective date of this act, one shall be appointed for a term of four years and two for terms of six years, from July first, nineteen hundred seventy-five. A member chosen to fill a vacancy otherwise than by expiration of a term shall be appointed for the unexpired term of the member whom he is to succeed.

4. Appeals shall be heard by the chairman or one member of the board and a majority vote of the board, including the

chairman and the members, shall be necessary for a determination of such appeal. Said determination shall be made within two hundred seventy days of the filing of a notice thereof.

5. The chairman and each member shall be an attorney, admitted to practice before the supreme court. The members of the board shall receive the sum of one hundred fifty dollars per day when rendering service as members, provided that the aggregate of such fees to any one member is any one fiscal year shall not exceed an amount established and approved by the director of the budget. The chairman and each member shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of their official duties. A member may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

6. The board shall have power, and it shall be its duty:

a. To meet and function at any place within the state;

b. To adopt, promulgate, amend and rescind suitable procedural rules with respect to the functioning of the board and the setting of time limits for hearing of appeals and the rendering of decisions thereon;

c. To hear appeals by any party to any proceeding before the division from all orders of the commissioner issued pursuant to this article, provided such appeals are commenced by filing with the board of a notice of appeal within fifteen days after service of such order;

d. To receive briefs, and, where the board deems it advisable, to hear oral argument with respect to such appeals;

e. To require the submission to it from the division of an original or certified copy of the entire record on which any order appealed from is based, which record need not be reproduced;

f. To stay the effectiveness of any order of the commissioner pending the determination of an appeal in proper cases and on such terms and conditions as the board may require.

7. The board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is:

a. in conformity with the constitution and laws of the state and the United States;

b. within the division's statutory jurisdiction or authority;

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;

d. supported by substantial evidence on the whole record; or

e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The division shall be bound by the decision of the board except to the extent such decision is reversed or otherwise modified by a court of competent jurisdiction pursuant to this article.

Added L.1968, c. 958, § 7; amended L.1969, c. 368; L.1971, c. 675; L.1975, c. 334, § 1; L.1977, c. 729, § 3.

[§ 297-a. Repealed. L.1984, c. 83, § 2, eff. June 1, 1984]